No. 90-898

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JANICE G. CLARK, *et al.*,
Petitioners,

v.

CHARLES "BUDDY" ROEMER, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, apply to elections for state court judges?

PARTIES

The parties in the court below are as follows:

Plaintiffs: Janice G. Clark, Orscini L. Beard, Eddie G. Crawford, Norbert C. Rayford, Voter Information Project, Inc., Louis Scott, Sylvia Cooks, Connie Sadler, Lloyd Dangerfield, Tom Nelson, Albert Richard, Brenda Ford, Edward Larvadain, and Josie Frank, on behalf of themselves and all others similarly situated.

Plaintiff-Intervenor: The New Orleans Chapter of the Louis A. Martinet Society.

Defendants: Charles "Buddy" Roemer, in his capacity as Governor of Louisiana; Fox McKeithen, in his capacity as Secretary of State of Louisiana; and William Guste, in his capacity as Attorney General of Louisiana.

Defendant-Intervenors: The Louisiana District Judges Association and the Orleans Parish Trial Judges Association.

The plaintiffs in the court below are petitioners in this Court. The defendants and defendant-intervenors in the court below are respondents in this Court.

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PETITION FOR A WRIT OF CERTIORARI

The petitioners, who are black citizens and voters of the State of Louisiana and plaintiffs in the district court, request that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, before judgment in that court, in order to review the judgment of the United States District Court for the Middle District of Louisiana entered in this proceeding on October 19, 1990.

OPINIONS BELOW

The August 15, 1988 opinion of the United States District Court for the Middle District of Louisiana finding liability under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, is reported at 725 F.Supp. 285 (M.D. La. 1988), and is reproduced in the appendix to this petition, p. 1a. The August 31, 1988 order amending the August 15 opinion is also reported at 725 F.Supp. 285 and is contained in the appendix, p. 94a. The June 12,

1990 opinion of the district court modifying its liability findings and outlining the remedy it planned to impose is unreported and is reproduced in the appendix, p. 118a. The October 19, 1990 order of the District Court vacating the previous findings of liability and granting judgment for the defendants on the Section 2 claims is unreported and is reprinted in the appendix, p. 223a. The judgment itself, dated October 19, 1990, is reproduced in the appendix, p. 227a. The district court's opinion of November 2, 1990, explaining its reasons for entering judgment for the defendants and vacating the relief previously granted the plaintiffs, is to be reported but is as yet unreported, and is contained in the appendix, p. 229a.

JURISDICTION

The judgment of the United States District Court for the Middle District of Louisiana was entered on October 19, 1990. The petitioners' notice of appeal from that judgment was filed on October 26, 1990, and an amended notice of appeal was filed on November 6, 1990. The appeal was docketed in the United States Court of Appeals for the Fifth Circuit on November 9, 1990 (No. 90-3785). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1), which permits certiorari to the courts of appeals "before or after rendition of judgment or decree."

STATUTE INVOLVED

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973:

> (a) No voting qualification or prerequisite to voting, standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f)(2) of this title [which applies the Act's protection to members of any language minority], as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance that may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

In this case, the district court found a violation of Section 2 of the Voting Rights Act in eleven judicial election districts in Louisiana (ten trial court districts and one intermediate appellate court district), but vacated its finding prior to the actual imposition of a remedy and entered judgment for the defendants because of the intervening decision in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), holding that Section 2 does not apply to judicial elections. In the meantime, the Attorney General of the United States objected under Section 5 of the Act, 42 U.S.C. § 1973c, to the at-large method of election of a number of judgeships created in those and other multi-member districts throughout the state, and continued to maintain his objections after the *LULAC* decision. A three-judge district court hearing the Section 5 claims in this case refused to enjoin elections for the unprecleared judgeships, and this Court granted in part an application to enjoin the elections pending appeal. *Clark v. Roemer*, 59 U.S.L.W. 3361 (Nov. 2, 1990, as modified Nov. 5, 1990). Review of the district court's Section 2 judgment is being sought

by this petition for certiorari, while review by direct appeal of the three-judge court's Section 5 ruling is being pursued through a jurisdictional statement that will be filed shortly after the filing of this petition.

Most of Louisiana's trial and intermediate appellate court judges are elected at-large from majority white multi-member districts with designated posts and a majority vote requirement. This case was filed in 1986 by black citizens of Louisiana challenging the election method in those multi-member districts under Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the Constitution, and challenging a number of unprecleared election changes in those same districts under Section 5 of the Act.[1] The jurisdiction of the district court was invoked under 42 U.S.C. §§ 1973, 1973c, and 1983, and 28 U.S.C. §§ 1331 and 1343(3) and (4). A statewide plaintiff class of black citizens was certified.

This case went to trial on the Section 2 claims in July of 1988. At the time, the governing law in the Fifth Circuit was *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.), *cert. denied*, 109 S.Ct. 390 (1988), which held that Section 2 applies to judicial elections. In an opinion issued August 15, 1988 and modified on August 31, the district court in this case, Hon. John V. Parker, found that Section 2 was violated in a large number of Louisiana's trial and appellate court districts. Pet. App. 98a-99a; 725 F.Supp. at 303-304.

In its opinion, the district court carefully examined the extensive evidence adduced at trial and made a number of findings, including the following:

** Across Louisiana and in each of the relevant districts there is what the district court called a "pro-

[1] A separate case, *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.), *cert. denied*, 109 S.Ct. 390 (1988), challenged a multi-member district used to elect two of the seven members of the Louisiana Supreme Court.

nounced and persistent" pattern of racially polarized voting to such an extent that the white majority has consistently defeated the preferred candidates of choice of minority voters. Pet. App. 63a-64a, 100a; 725 F.Supp. at 298-299, 304.

** Of the 54 black-white judicial election contests held in various parts of Louisiana over the previous ten years, a majority of black voters supported the black candidate in 49 elections, while in *none* of the 54 elections did a majority of white voters support the black candidate. Pet. App. 57a-58a; 725 F.Supp. at 297.

** Only five of the state's 178 district court (trial court) judges is black and only one of the 48 intermediate court of appeal judges is black. Pet. App. 66a; 725 F.Supp. at 299. This is despite the fact that 29.4% of Louisiana's population is black. Pet. App. 24a; 725 F.Supp. at 291. Of those few black citizens who managed to achieve judicial office, most did so by way of appointment to a vacancy and a subsequent unopposed election. Pet. App. 83a; 725 F.Supp. at 302.

** In the areas where violations were found, election lines can be redrawn so that some of the election districts would be majority black. Pet. App. 78a-80a; 725 F.Supp. at 301-302.

** The opportunities of black citizens in Louisiana to participate in the political process are limited by a long history of racial discrimination and pronounced socio-economic disparities between whites and blacks. Pet. App. 45a-47a, 65a; 725 F.Supp. at 295-296, 299.

** Under the current election system, black candidates have a more difficult time raising campaign funds than white candidates. Pet. App. 73a-74a; 725 F.Supp. at 300.

** There is evidence "of both subtle and overt racial appeals" in recent judicial elections in several parts of the state. Pet. App. 65a-66a; 725 F.Supp. at 299.

** Louisiana's requirement of designated posts for judicial candidates hinders black ability to elect candidates of choice from the existing districts. 725 F.Supp. at 301; Pet. App. 75a-76a.

After examining all of these factors as part of what Section 2 calls the "totality of circumstances," the district court concluded that black citizens have less opportunity than other members of the electorate to elect candidates of choice to judgeships in the relevant districts and that Section 2 accordingly is violated.[2]

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[2] A subsequent opinion by the district court spoke dramatically of obstacles faced by highly qualified black judicial candidates unable to compete fairly in majority white districts because of the color of their skin. Of Al Gray, a prominent black lawyer in the Fourteenth Judicial District, the district court wrote:

> He was the first black to run for judicial office in the district and virtually no white lawyer or office holder would publicly endorse his campaign. He was told repeatedly that "Calcasieu Parish is not ready for a black judge," he had great difficulty raising funds, and he had great difficulty placing any yard signs in white areas (only two signs were placed [in white areas] in the entire parish). Mr. Gray campaigned almost exclusively in the white community; he received almost all of the black votes and very few white votes against two white opponents.

Of Sylvia Cooks, a well-known black lawyer, former law clerk to a Justice of the State Supreme Court, and former assistant district attorney in the Fifteenth Judicial District, the district court said:

> Mrs. Cooks had fund raising problems in the white community similar to those of Mr. Gray in the Fourteenth District and similar problems in obtaining public white support. She also testified about the overt and covert racial appeals in both elections by candidates and the public. By all accounts, Mrs. Cooks ran a professional, well organized campaign, using a public relations specialist (who also testified), polls, television, etc. She spent large amounts of her own money. The court can say, without depreciating the qualifications of any of her opponents, that Mrs. Cooks was as least as well qualified professionally as any opponent in either race. As she put it, however, there was nothing that she could do about the color of her skin. There is no doubt that the white majority in the Fifteenth Judicial District voted against her in both races

Responding to an opportunity provided by the district court, the Louisiana legislature designed a potential remedy involving the use of election subdistricts, some of which would have been majority black, and proposed the remedy to the state's voters in a referendum on a state constitutional amendment. However, that referendum was defeated in November of 1989 as the result of white bloc voting. In February of 1990, an evidentiary hearing was held in the district court regarding the appropriate remedy. On June 12, 1990, the district court issued an opinion narrowing its findings of Section 2 violations to eleven districts—ten trial court districts and one appellate court district. Pet. App. 222a. In addition, the district court concluded that the appropriate remedy for those eleven districts would be the creation of election subdistricts, some of which would be majority black and others majority white. *Id.* 218a-219a. The Court did not draw the subdistricts, but asked the parties to attempt to reach agreement on the subdistrict lines. *Id.* 221a.

Before any further remedial proceedings were held, the Fifth Circuit issued its highly divided en banc decision on September 28, 1990 in *LULAC v. Clements*, which involved elections for trial judges in Texas. A majority of seven members of the Court expressed the view, in an opinion by Judge Gee, that Congress' use of the word "representatives" in the 1982 amendment to Section 2 was designed to exclude state court judges from the reach of that provision. Another four judges, in a concurring opinion by Judge Higginbotham, said that Section 2 covers judicial elections and permits challenges to at-large elections for *appellate court* judgeships, but does not permit similar challenges regarding *trial court* judgeships because each trial judge exercises his or her power independently rather than collegially. Chief Judge Clark

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because of the color of her skin and that the bloc vote prevented the black preferred candidates from winning.

June 12, 1990 opinion, Pet. App. 162a, 165a-166a.

issued a concurring opinion for himself stating that Section 2 does not permit a challenge to at-large elections for any judgeship, trial or appellate, where the challenged election district is geographically co-extensive with the area from which the judge normally hears cases, but does permit a challenge where the existing election district is smaller than the area normally served by the judge. Judge Johnson dissented, saying that Section 2 is applicable to discriminatory election systems for all judges, whether trial or appellate. Judge Johnson's dissent called the majority opinion "a burning scar on the flesh of the Voting Rights Act." 914 F.2d at 652 (Johnson, J., dissenting).

In the wake of the *LULAC* decision, the district court in the present case vacated its findings of a Section 2 violation and on October 19, 1990 entered judgment for the defendants on the Section 2 claims. The district court's judgment covered not only the ten trial court districts previously found in violation, but also the one appellate district found in violation—a district that elects some of the judges on one of the intermediate circuit courts of appeal and that is smaller than the area from which those particular appellate judges hear cases.[3] Six members of the en banc Fifth Circuit would have permitted the claim involving that appellate district (the four judges in the Higginbotham opinion, Chief Judge Clark, and Judge Johnson), but seven would not, and the district court accordingly dismissed that Section 2 claim along with the others. Pet. App. 232a.

Meanwhile, as noted earlier, the Attorney General objected under Section 5 to the at-large method of election

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[3] Louisiana is divided into five circuit courts of appeal. Each circuit is divided into smaller districts, most of which are multi-member. Most of the judges on each circuit bench are elected from the smaller districts. At the same time, the judges on each circuit court of appeal hear cases from throughout the circuit. Thus, most of the intermediate appellate court judges are elected from districts smaller than the geographic area from which the judges hear cases.

for several unprecleared judgeships in these same multi-member districts, as well as others in the state, and continued to maintain his objections after *LULAC*. A three-judge court hearing the Section 5 claims in this case refused to enjoin the fall, 1990 elections for the unprecleared judgeships, leading to an application for injunction pending appeal that was granted in part by this Court on November 2, 1990. *Clark v. Roemer*, 59 U.S.L.W. at 3361. A jurisdictional statement in support of the direct appeal from the three-judge court decision will be filed shortly after this petition is filed.[4]

REASONS FOR GRANTING THE WRIT

I. A CONFLICT IN THE CIRCUITS EXISTS REGARDING THE APPLICABILITY OF SECTION 2 TO JUDICIAL ELECTIONS.

The decision of the Fifth Circuit in *LULAC v. Clements*, and the district court's adherence to *LULAC* in the present case, are in direct conflict with the holding of the Sixth Circuit in *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988). *Mallory* involved a challenge to at-large elections for trial judges in Cincinnati and Hamilton County, Ohio, and the Sixth Circuit held that Section 2 applies to such a challenge.[5]

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[4] The judgment dismissing the Section 2 claims was entered under Rule 54(b), F.R.Civ.P., leaving the Fourteenth and Fifteenth Amendment claims pending in the single-judge district court. The district court previously decided not to resolve the constitutional claims as long as the case could be disposed of on statutory grounds. Pet. App. 37a-38a; 725 F.Supp. at 294. *See, Escambia County v. McMillan*, 466 U.S. 48 (1984) (constitutional claims in voting rights case should not be addressed if the matter can be resolved under Section 2). It will be unnecessary to decide the constitutional issues if this Court overrules the Fifth Circuit and holds that Section 2 is applicable.

[5] The Sixth Circuit's decision in *Mallory* contains a thorough examination of the language, congressional purpose, legislative history, and prior construction of the Voting Rights Act. The points

No other courts of appeals have addressed the issue. The Eleventh Circuit, in a case that did not involve the election of judges, appeared to indicate it would follow the Sixth Circuit rather than the Fifth on this issue when it said: "Nowhere in the language of Section 2 nor in the legislative history does Congress condition the applicability of Section 2 on the function performed by an elected official." *Dillard v. Crenshaw County, Alabama*, 831 F.2d 246, 250 (11th Cir. 1987).

The only district courts outside the Fifth and Sixth Circuits to have ruled on the question concluded that Section 2 governs judicial elections. *Williams v. State Board of Elections*, 696 F.Supp. 1563 (N.D. Ill. 1988); *SCLC v. Siegelman*, 714 F.Supp. 511 (M.D. Ala. 1989); *Nipper v. Martinez*, No. 90-447-Civ-J-16 (M.D. Fla. July 20, 1990) (denying motion to dismiss). In *SCLC* and *Nipper*, the district courts have been asked by defendants to reconsider their holdings in light of the recent *LULAC* decision, but both have declined to follow *LULAC* and have permitted the Section 2 challenges to go forward. *SCLC*, No. 88-D-0462-N (order of Dec. 5, 1990); *Nipper* (order of Nov. 23, 1990).

II. THIS CASE INVOLVES AN IMPORTANT AND UNSETTLED QUESTION ABOUT THE INTERPRETATION OF THE VOTING RIGHTS ACT THAT SHOULD BE RESOLVED BY THIS COURT.

This Court stated in *Thornburg v. Gingles*, 478 U.S. 30, 43 (1982) that Section 2 "prohibits all States and political subdivisions from imposing *any* voting qualifications or prerequisites to voting, or standards, practices, or procedures which result in the denial or abridgement of the right to vote of any citizen who is a member of a

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made in that discussion demonstrate that Section 2 is applicable and that the decision below in the present case is erroneous. In the interest of brevity in this petition for certiorari, those points are not repeated here.

protected class of racial and language minorities." (Emphasis in original). The Senate Judiciary Committee report accompanying the 1982 amendment of Section 2 said that Section 2 is "*the major* statutory prohibition of *all* voting rights discrimination." S. Rep. No. 417, 97th Cong., 2d Sess. at 30, 1982 U.S. Code Cong. & Admin. News 177, 207 (emphasis added). Clearly, Section 2 is the centerpiece of Congress' statutory effort to eliminate racial discrimination in voting.

Some 40 of the 50 states employ popular elections for some or all of their judgeships. While racial discrimination does not exist in judicial elections in all of those states, nor in all election districts within a given state, the potential for discrimination exists in some states and in some judicial districts. The findings of discrimination by the district court in the present case illustrate that potential.

Given that Section 2 is the centerpiece of the Congressional effort to banish racial discrimination in voting, and given that many states choose judges through the electoral process, it is important for this Court to determine if Congress intended to exclude judicial elections from the reach of Section 2 or if it intended Section 2 to prohibit discrimination in all elections.

The issue of Section 2's applicability to judicial elections has arisen in a number of cases around the country. Challenges under Section 2 to particular election districts for judges have been brought in federal courts within the Fourth, Seventh, Eighth, and Eleventh Circuits, as well as the Fifth and Sixth Circuits.[6] Final

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[6] *Alexander v. Martin*, No. 86-1048-CIV-5 (E.D.N.C.); *Williams v. State Board of Elections*, 696 F.Supp. 1563 (N.D. Ill. 1988); *Hunt v. Arkansas*, No. PB-C-89-406 (E.D. Ark.); *Brooks v. State Board of Elections*, No. 288-146 (S.D. Ga.); *Davis v. Martinez*, No. 90-40098 MP (N.D. Fla.); *Nipper v. Martinez*, No. 90-447-Civ-J-16 (M.D. Fla.); *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc); *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.

resolution of Section 2's coverage in pending and future cases requires this Court to grant certiorari on the issue.

Resolution of the issue also is important to eliminate any confusion surrounding the interrelationship of Section 2 and Section 5. The decision below holding Section 2 inapplicable to judicial elections flies in the face of the decisions of this Court holding that Section 5 applies. *Brooks v. Georgia State Board of Elections*, No. CV 288-146 (S.D. Ga. December 1, 1989) (three-judge court), *aff'd mem.*, 59 U.S.L.W. 3293 (October 15, 1990); *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986). *See also*, *Clark v. Roemer*, 59 U.S.L.W. 3361 (Nov. 2, 1990, as modified Nov. 5, 1990) (injunction pending appeal against judicial elections that violate Section 5). The language of Section 5 delineating the scope of that provision ("any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting") is nearly identical to the language of Section 2 describing its coverage ("voting qualification or prerequisite to voting or standard, practice, or procedure"). In light of the identity of language, and the fact that the two sections are companion provisions of the same Act, it is difficult to imagine that Congress intended for one to apply to the election of judges and not the other.

The problem caused by conflicting interpretations of the two provisions is nowhere better illustrated than in the present case. Because of the Fifth Circuit's ruling in *LULAC*, nothing can be done by the federal district court in Louisiana under Section 2 about at-large elections in longstanding multi-member districts it has found to be discriminatory, even though the creation of new at-large judgeships in the same districts is barred by the Attor-

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1988), *cert. denied*, 109 S.Ct. 390 (1988); *Clark v. Edwards*, 725 F.Supp. 285 (M.D. La. 1988); *Martin v. Allain*, 658 F.Supp. 1183 (S.D. Miss. 1987); *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988).

ney General's Section 5 objections. (A few pre-existing judgeships that never were precleared also are the subject of the Attorney General's objection). This dichotomy shows that the two provisions are not operating in tandem, but instead are being taken in very different directions. Moreover, the conflicting interpretations leave a significant gap, particularly with respect to the discriminatory judgeships in Louisiana that were created prior to the effective date of Section 5 (November 1, 1964) and are now immune from statutory challenge under Section 2.

Indeed, the confusion already has caused a three-judge district court in the Western District of Louisiana to interpret the *LULAC* decision to mean that *Section 5* is inapplicable to voting changes involving the at-large election of judicial officers, *Hunter v. City of Monroe*, No. 90-2031 (W.D. La. Nov. 7, 1990), even though this Court clearly has held to the contrary in *Brooks* and *Haith v. Martin.*

Not only is the Section 2 issue raised by the decision below a matter of public importance, but it is a matter of *imperative* public importance that needs to be resolved quickly. In Louisiana, for instance, the Fifth Circuit's recent action in *LULAC* forced the district court to permit judicial elections to proceed in 1990 (with the exception of races for a few seats enjoined by this Court under Section 5) under the existing system in the districts where the court previously found the system discriminatory. It was 1986 when black citizens filed this case, but their Section 2 claims remain in limbo, derailed by the Fifth Circuit's sudden about-face in *LULAC*. This Court should grant certiorari to resolve this issue at the earliest possible opportunity.

III. CERTIORARI BEFORE JUDGMENT IN THE COURT OF APPEALS IS APPROPRIATE IN THIS CASE.

Certiorari before judgment is appropriate to permit the Section 2 issue in this case to be heard at the same time as the Section 5 issues that will be raised on direct appeal from the three-judge court's decision. *See, New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970) (certiorari granted before judgment so the case could be heard along with related proceedings that had reached the Supreme Court by way of direct appeal from a three-judge district court). *See also, McCulloch v. Marineros de Honduras*, 372 U.S. 10, 12 and n.1 (1963) (certiorari granted before judgment so the matter could be heard with other related cases growing out of the same factual occurrence).

Moreover, given that similar cases raising the Section 2 issue in various factual contexts are now before this Court on petitions for certiorari, *Chisom v. Roemer*, No. 90-757; *Houston Lawyers' Association v. Mattox*, No. 90-813, it would be useful to grant certiorari before judgment to hear the present case along with those cases. This Court occasionally has granted certiorari before judgment in order to hear cases that raise similar or identical issues to other cases accepted by the Court for review. *See, e.g., Taylor v. McElroy*, 360 U.S. 709, 710 (1959); *Brown v. Board of Education*, 344 U.S. 1, 3 (1952); *Porter v. Dicken*, 328 U.S. 252, 254 (1946).

Section II of this petition describes the importance of the issue in this case, the number of cases and jurisdictions that will be affected by resolution of the issue, and the need for expedited resolution. For the reasons given therein, this case involves a question that satisfies Supreme Court Rule 11's requirement of sufficient "imperative public importance" to justify issuance of certiorari before judgment in the Court of Appeals.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court
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No. 90-898

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JANICE G. CLARK, *et al.*,
Petitioners,

v.

CHARLES "BUDDY" ROEMER, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JANICE G. CLARK, ET AL CIVIL ACTION

VERSUS

EDWIN W. EDWARDS, ET AL NO. 86-435-A

FINDINGS OF FACT AND CONCLUSIONS OF LAW
[Entered Aug. 15, 1990]

This is a class action brought by black voters and black lawyers who possess the qualifications to be elected Louisiana district court, family court, and court of appeal judges. Plaintiffs claim that use of multimember districts to elect family court, district court and court of appeal judges operates to dilute black voting strength in violation of the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act of 1965.

The original plaintiffs are Janice G. Clark and three other black lawyers who live in East Baton Rouge Parish, each of whom is a qualified voter and each of whom meets the statutory requirements for the office of judge, and Voter Information Project, Inc., a non-profit corporation, which promotes the right of black and poor people to a participate in the electoral process. Subsequently, additional black lawyers from other parts of the state were allowed to become parties-plaintiff and the New Orleans Chapter of the Louis A. Martinet Society was permitted to intervene as a plaintiff. The defendants are the Governor of Louisiana, the Secretary of State, the Attorney General, all in their official capacities, and various other state and local election officials. The Louisiana District Judges Association and

the Orleans Trial Judges Association were permitted to intervene as defendants.

The case has been tried on the merits and the court has issued a preliminary injunction, enjoining the holding of elections for certain judicial offices which were scheduled for October 1988. This will constitute the court's findings of fact and conclusions of law on both the motion for preliminary injunction and the merits.

THE STIPULATIONS

The parties have entered written stipulations containing 103 paragraphs, to which the defendants make 66 objections, all upon the ground of relevancy. The information objected to generally relates to 1980 census information including, population, race and socio-economic facts, specific information about the number of black

judges in Louisiana and how they attained their positions, black elections generally and other miscellaneous information. The court overrules all objections. The information, some of which is only marginally helpful, is admittedly true and generally well known. Attached to the written stipulations identified as "Attachment A" is a list which the parties stipulate accurately describes the number of judges in each district court judicial district, the parishes which comprise the district, the total population, total black population and black percentage of population (according to the 1980 census) in each parish and district court district. They also attach "Attachment B" and stipulate that it accurately describes the number of judges for each court of appeal circuit and district in a fashion similar

to the district court stipulation. A copy of each attachment, Attachment A and Attachment B, is attached to and made a part of this opinion.

The other stipulations are:

3. In all district court districts which contain more than one judge, the judges are elected through at-large voting from the entire district.

4. There are five circuit courts of appeals in Louisiana. Each of the five is divided into separate election districts, as reflected in Attachment B. In those districts which contain more than one judge, the judges are elected through at-large voting from the entire district. In addition, as reflected in Attachment B, some of the circuits have judges who are elected at-large from the entire circuit.

5. The family court in East Baton Rouge Parish is composed of three judges, who are elected at-large from the entire parish. East Baton Rouge Parish has a total population, according to the 1980 census, of 366,191, a black population of 114,741, and a black percentage of population equaling 31.3%.

6. In Louisiana, candidates running for district court, appellate court, and family court judge must win a majority of the vote in order to be elected to office.

6A. In Louisiana, candidates running for district court, appellate court, and family court judge must be attorneys, must have been admitted to the practice of law in Louisiana for at least five years prior to the election, must have been domiciled in the respective district, or parish for the two years

preceding the election, and shall not practice during the term of office. La. Const. Art. 5, Section 24.

7. In Louisiana, candidates running for district court and appellate court judgeships from multimember districts, and for family court judgeships in East Baton Rouge Parish, must run from a designated division or post within the district.

8. For those district court and family court judgeships which are elected from multimember districts in the State of Louisiana, the judge must be a resident of the district, but there is no further residency requirement mandating that the candidate reside in a particular geographic portion of the district. For those Court of Appeal judgeships which are elected from multimember districts in the State of Louisiana, the judge must be

a resident of the circuit and the respective district, but there is no further residency requirement mandating that the candidate reside in a particular geographic portion of the district.

9. Outside of Orleans Parish, there are 156 district court judgeships in Louisiana.

10. Outside of Orleans Parish, there are two black judges (and no more than two) who have been elected to, or who will be serving in, district court judgeships as of June, 1988.

11. Outside of Orleans Parish, the black judges who have been elected to, and who will be serving as, district court judges as of June, 1988 are Carl Stewart in District 1 (composed of Caddo Parish), and Freddie Pitcher in District 19 (composed of East Baton Rouge Parish).

12. In Orleans Parish, the criminal district court is composed of 10 judges and the civil district court is composed of 12 judges. All of the judges on the criminal and civil district courts in Orleans Parish are elected at-large from the entire parish.

13. In Orleans Parish, no black attorneys are currently serving as judges on the criminal district court. Israel Augustine is a black attorney who was appointed to the Orleans Parish criminal district court in 1969 to a vacancy. He ran for election in 1970 to his seat on the criminal district court. In the Democratic primary of that election, he defeated two white candidates. He was unopposed in the general election. He is the only black attorney of whom the parties are aware (excluding ad hoc appointments) who has served on the

Orleans Parish criminal district court in the twentieth century.

14. In Orleans Parish, three black attorneys currently serve as judges on the civil district court. They are the only three black attorneys of whom the parties are aware who have been elected to the Orleans Parish civil district court in the twentieth century. They are Revius Ortique, Jr., Bernette Johnson, and Yada McGee.

15. Currently, there are 48 Court of Appeal judgeships in the State of Louisiana.

16. There is one (and no more than one) black attorney currently serving as a Court of Appeal judge in the State of Louisiana, and that is Judge Joan Armstrong, who was elected in 1984 from District 1 of the Fourth Circuit.

District 1 of the Fourth Circuit is composed of Orleans Parish.

17. If each of the existing multimember judicial districts were subdivided into single-member subdistricts -- with the number of single-member subdistricts equalling the number of judges in the original district, and with the subdistricts being of roughly equal population when compared to the other subdistricts within the original district -- the black population in the following multimember districts is sufficiently large and geographically compact to constitute a majority in at least one of the single-member subdistricts;

The Family Court of East Baton Rouge Parish;

District court districts: 1, 4, 6, 9, 14, 15, 18, 19, 23, 24, 27, 40;

The Orleans Parish Civil District Court;

The Orleans Parish Criminal District Court;

Court of Appeal districts: First Circuit district 2, Fourth Circuit district 1.

In addition, using no more than a 5% plus or 5% minus deviation from the ideal subdistrict size within any given district, it is impossible to create single-member subdistricts equalling the number of judges in the original district and still obtain at least one majority black single-member subdistrict in the following districts:

District court districts: 5, 12, 13, 17, 22, 25, 30, 32, and 34.

Court of Appeal districts: First Circuit, district 1; Second Circuit, district 2 (two judges); Third Circuit, district 1 (two judges); Third Circuit, district 2 (two judges); Third Circuit, district 3 (two judges).

(The absence of a stipulation regarding the remaining districts is not meant to suggest anything one way or the other about those districts. They may be the subject of proof at trial. In addition, the parties are entering into no stipulation regarding the issue of whether the hypothetical judicial subdistricts must fall within a 5% plus or 5% minus deviation from the ideal subdistrict size in a given district).

18. The following district court districts contain only one judge; 8, 28, 31, 33, 35, 36, 37, 38, and 39.

19. Of the 48 Court of Appeal judgeships in the State of Louisiana, 44 are elected from multimember districts.

20. Of the 178 district court judgeships in the State of Louisiana, 169 are elected from multimember districts.

21. In the State of Louisiana, justices of the peace are elected from single-member districts.

21A. In the State of Louisiana, justices of the peace are not required to be lawyers, are not required to have practiced law or have been engaged in any legal-related work, and are elected at the congressional election for terms of six years by the qualified voters within the territorial limits of their jurisdiction, according to R.S. 13: 2582, as amended by Acts 1984, No. 219, Section 1.

22. The Louisiana Supreme Court is composed of seven elected justices. For purposes of their election, the state is divided into six districts. The First Supreme Court district is composed of Orleans, St. Bernard, Plaquemines, and Jefferson Parishes, and elects two

justices at-large from those four Parishes. The remainder of the state is divided into five single-member districts, each of which elects one justice.

23. While none of the justices on the Louisiana Supreme Court is elected statewide, the Supreme Court has statewide jurisdiction. The Supreme Court sits as a body of the whole, and four of its seven members must concur to render judgment. Pursuant to Article 5, section 2 of the Louisiana Constitute, a single justice of the Supreme Court may issue writs of habeas corpus and all needful writs, orders, and process in aid of the jurisdiction of the Court, and exercise of this authority is subject to review by the whole court.

24. Since 1965, the State of Louisiana has been covered by the

suspension of tests provision (section 4) and the federal preclearance of voting law changes provision (section 5) of the Voting Rights Act of 1965.

25. Pursuant to Section 6 of the Voting Rights Act of 1965, 42 U.S.C. section 1973d, the United States Department of Justice has designated various Louisiana parishes for the appointment of federal examiners (registrars).

26. Pursuant to Section 8 of the Voting Rights Act of 1965, the United States Department of Justice has sent federal observers to observe elections in the State of Louisiana.

27. In the twentieth century, no black citizen has been elected to statewide office in the State of Louisiana.

28. In the twentieth century, no black citizen has been elected to the United States Congress from the State of Louisiana.

29. In the twentieth century, no black attorney has been elected to the Louisiana Supreme Court. A black attorney, Jessie Stone, was appointed to a vacancy on the Louisiana Supreme Court for a period of 17 days, from November 2, 1979 through November 19, 1979.

30. All of the current officers of the Louisiana Bar Association are white.

31. None of the present black members of the Louisiana legislature was elected from a district which was majority white in population.

32. None of the elected district attorneys in the State of Louisiana are black.

33. In the twentieth century, none of the elected district attorneys in the State of Louisiana have been black.

34. Candidates for judicial posts in the State of Louisiana do not run from partisan primaries. Instead, all candidates run in a single non-partisan primary. The two top candidates in the primary then compete in a general election, with the candidates receiving the majority of the vote being declared the winner.

35. District court judges in the State of Louisiana serve six-year terms, and appellate court judges serve ten year terms.

36. The most recent regular election for district judges in Louisiana was held in 1984, and the next regular election will be in 1990.

37. According to 1980 Census figures, the median family income in the State of Louisiana was $20,867 for whites and $10,459 for blacks. The median income of black families was therefore 50.12 percent of that of white families.

38. According to 1980 Census figures, 18.93 percent of white families in Louisiana had incomes less that $10,000; 43.20 percent had incomes between $10,000 and $24,999; and 37.87 percent had incomes of $25,000 or more. By contrast, 48.25 percent of black families in Louisiana had incomes less than $10,000; 37.25 percent had incomes between $10,000 and $24,000; and 14.49 percent had incomes of $25,000 or more.

39. According to 1980 Census figures, the median income for unrelated individuals in the State of Louisiana was $6,709 for whites and $3,203 for blacks.

The median income of black unrelated individuals was therefore 47.74 percent of that of whites.

40. According to 1980 Census figures, 295,873 whites in the State of Louisiana had incomes which fell below the poverty level; 456,909 blacks had poverty-level incomes. The total number of persons in Louisiana with incomes below the poverty level was 762,108. Blacks therefore comprised 59.95 percent of all persons below poverty level; whites comprised 38.82 percent of persons below poverty level. 10.4 percent of white persons in the State of Louisiana had incomes which fell below poverty; this was true for 38.0 percent of blacks in the state.

41. According to 1980 Census figures, the median years of school completed for persons 25 years of age and

older in the State of Louisiana was 12.4 for whites and 10.7 for blacks. 5.2 percent of white persons 25 years of age and over in the state had less than 5 years of elementary education; 15.1 percent of black persons 25 and over had less and 5 years of schooling. 63.7 percent of white persons in Louisiana 25 and over were high school graduates; 40.5 percent of blacks in this age group had graduated from high school. 16.0 percent of whites 25 and over had four or more years of college; 7.5 percent of blacks had four or more years of college.

42. According to 1980 Census figures, 2.6 percent of white persons in the State of Louisiana 16 years and over were unemployed, while 5.7 percent of blacks 16 and over were unemployed.

43. According to 1980 Census figures, of 340,396 persons 16 years and

older employed in managerial and professional specialty occupations in the State of Louisiana, 288,640 (84.66 percent) were white and 48,544 (14.24 percent) were black. Of 479,054 persons employed in technical, sales, and administrative support occupations, 399,897 (83.48 percent) were white and 74,648 (15.58 percent) were black. Of 218,816 persons in Louisiana employed in service occupations, 110,579 (50.54 percent) were white and 105,361 (48.15 percent) were black.

44. According to 1980 Census figures, there were 1,030,950 occupied housing units in the State of Louisiana with a white householder; there were 365,643 occupied housing units in Louisiana with a black householder. 70.96 percent of occupied housing units with a white householder were owner-

occupied; 51.01 percent of units with a black householder were owner-occupied. [Tables 13 and 14, Detailed Housing Characteristics, Louisiana].

45. Louisiana was once a state where slavery was sanctioned by law, and vestiges of discrimination persisted for some time which affected the rights of black persons to register to vote or otherwise to participate in the democratic process.

46. In the twentieth century, no black person was elected to the Louisiana legislature until 1967.

47. The first black person elected to the Louisiana legislature in the twentieth century was Ernest N. Morial, elected to the state house of representatives in 1967.

48. No black citizen was elected to the Louisiana Senate in the twentieth century until 1974.

49. According to 1980 census figures, the total population of the State of Louisiana is 4,205,900, and the black population is 1,238,241, or approximately 29.4% of the total.

50. According to 1980 census figures, the voting age population of the State of Louisiana is 2,875,432, and the black voting age population is 766,187, or approximately 26.6% of the overall voting age population.

51. Outside of Orleans Parish, four black attorneys (and no more than four) have been elected to district court judgeships in the twentieth century in the State of Louisiana.

52. The four black attorneys of whom the parties are aware who have been

elected to district court judgeships in the twentieth century in the State of Louisiana, outside of Orleans Parish, are Paul Lynch, elected in District 1 in 1978, Lionel Collins, elected in District 24 in 1978, Carl Stewart, elected in District 1 in 1985 and Freddie Pitcher, elected in District 19 in 1986.

53. Judge Lionel Collins was first elected to the district court in District 24 in 1978, and re-elected as an incumbent in 1984. He died in April, 1988 while still in office.

54. In the 1978 election, when he was first elected to office as a district judge in District 24, Lionel Collins had no opposition.

55. Prior to his election to the district court bench in 1978, Lionel Collins was appointed to a vacancy on the district court in District 24.

56. In the 1984 election, when he was re-elected as an incumbent to office as a district judge in District 24, Lionel Collins had no opposition.

57. Paul Lynch ran for district judge in District 1 in the 1974 election and was defeated by a white opponent.

58. Judge Paul Lynch died in 1982 before the completion of his term as a district court judge in District 1.

59. Carl Stewart was first elected district court judge in District 1 in 1985.

60. The parties are not aware of any black attorney who has been elected to a Court of Appeal judgeship in the twentieth century, in the State of Louisiana outside of Orleans Parish.

61. No black judge currently serves as an officer or member of the executive

committee of the Louisiana District Judges Association.

62. Prior to his death in 1982, Judge Paul Lynch, a black attorney, served on the executive committee of the Louisiana District Judges Association.

63. No black judge has ever served as one of the officers ("officers" meaning president, 1st vice president, 2nd vice president, secretary, and treasurer) of the Louisiana District Judges Association.

64. At the present time, approximately 2% of the enrollment of the Louisiana State University Law School is constituted by black students.

65. The law school at Southern University first opened in 1947.

66. The first class to graduate from the Southern University Law School was in 1950.

67. At its inception, the law school at Southern University was completely black in terms of student enrollment. At the present time, the student body includes both black and white students.

68. At the inception of the Southern University School of Law, some of the courses were taught by members of the faculty of the LSU Law School.

69. As far as the parties are aware, in the twentieth century, no law school in Louisiana accepted any black students until the opening of Southern University Law School in 1947.

70. Currently, there are 32 full-time faculty members at the Louisiana State University Law School, and two of those are black. Currently, there are 15 full-time faculty members at the Southern University Law School. Of those, nine

are black, five are white, and one is from India.

71. As far as the parties are aware, in the twentieth century, only three black persons have served as full-time permanent faculty members (excluding visiting faculty members) at the Louisiana State University Law School

72. The only public law schools operating in the State of Louisiana after 1940 are the Louisiana State University Law School and the Southern University Law School. Private law schools operating in Louisiana after 1940 include the Tulane Law School and the Loyola Law School.

73. The first black graduate of Louisiana State University Law School, Ernest Morial, was admitted to the law school after a three-judge federal court in the class action case of Wilson v.

Board of Supervisors of Louisiana State University, 92 F. Supp. 986 (E.D. La. 1950) (three-judge court), summarily aff'd 340 U.S. 909 (1951), ordered the Board of Supervisors of Louisiana State University to stop denying law school admission to black students on the basis of race.

74. As far as the parties are aware, the black judges who have been elected to district court or the court of appeal in Orleans Parish in the twentieth century are: Isarel Augustine (Court of Appeal); Ernest Morial (Court of Appeal); Joan Armstrong (Court of Appeal); Revius Ortique, Jr. (Civil District Court); Bernette Johnson (Civil District Court); Yada McGee (Civil District Court).

75. Israel Augustine was appointed in 1969 to a vacancy for the criminal district court in Orleans Parish.

76. At the time Israel Augustine was elected to the Court of Appeal, he was a sitting criminal district court judge, having first been appointed to a vacancy on the criminal district court in 1969 and having been elected to the position on the criminal district court in 1970.

77. When Israel Augustine was elected to the Court of Appeal, he had no opposition.

78. At the time Ernest Morial was elected to the Court of Appeal, he had no opposition.

79. Ernest Morial was elected to the Court of Appeal, he was a sitting Juvenile Court Judge.

80. Subsequent to his appointment to the Juvenile Court, Ernest Morial ran for election as an incumbent for his

juvenile court seat, and had no opposition.

81. As far as the parties are aware, there has never been more than one black Court of Appeal judge at any single time in the twentieth century in Louisiana.

82. As far as the parties are aware, Ernest Morial was the first black attorney to be elected to the Court of Appeal in the State of Louisiana in the twentieth century, and his election was in 1972.

83. Revius Ortique first came to the civil district court bench by virtue of appointment to a vacancy in 1978.

84. Revius Orique was first elected to the civil district court bench in 1979, when he was running as an incumbent by virtue of his previous appointment to the position.

85. At his first election to the civil district court in 1979, Revius Ortique had opposition, but in his second election in 1984, he had no opposition.

86. Bernette Johnson was first elected to the civil district court in 1984.

87. Joan Armstrong was elected to the Court of Appeal in 1984.

88. Israel Augustine retired from his seat on the Court of Appeal in 1984.

89. At the time Joan Armstrong ran for the Court of Appeal in 1984, she was a sitting juvenile court judge.

90. Joan Armstrong had been appointed to the Juvenile Court judgeship, Section A, after Ernest Morial vacated that seat to go on the Court of Appeal.

91. When Joan Armstrong ran for the Court of Appeal, she had no opposition in the election.

92. Yada McGee was first elected to the civil district court in 1986.

93. All black attorneys who have been elected to the Court of Appeal in Louisiana in the twentieth century were elected in Orleans Parish.

94. According to 1980 Census figures, the median value of owner-occupied housing units with a white householder was $47,800 and with black householder it was $25,500. [Tables 8 and 9, General Housing Characteristics, Louisiana].

95. According to 1980 Census figures, .44 percent of owner-occupied housing units with a white householder in Louisiana lacked complete plumbing for exclusive use, whereas 2.38 percent of

owner-occupied housing units with a black householder lacked such facilities. Among all occupied housing units with a white householder, 1.14 percent lacked a complete bathroom; among those with a black householder, 7.54 lacked complete bathroom facilities. [Tables 8 and 9, General Housing Characteristics, Louisiana; Tables 63 and 64, Detailed Housing Characteristics, Louisiana].

96. According to 1980 Census figures, 7.56 percent of occupied housing units with a white householder in Louisiana lacked a telephone while 19.96 of occupied housing units with a black householder lacked a phone. [Tables 63 and 64, Detailed Housing Characteristics, Louisiana).

97. According to 1980 Census figures, 7.68 percent of occupied housing units with a white householder had no

vehicle available; 31.28 percent of black occupied housing units were without vehicles. [Tables 63 and 64, Detailed Housing Characteristics, Louisiana].

98. According to 1980 Census figures, 3.40 percent of owner-occupied housing units with a white householder had more than one person per room; 12.82 percent of owner-occupied black households had more than one person per room. 3.86 percent of all occupied housing units (renter-and owner-occupied) with a white householder had more than one person per room; 15.66 percent of all black occupied housing units had more than one person per room. [Tables 13 and 14, General Housing Characteristics, Louisiana].

99. According to 1980 Census figures, the median contract rent for occupied housing units with a white

householder was $197, and for black occupied housing units the median contract rent was $99. [Tables 8 and 9, General Housing Characteristics, Louisiana].

The parties have also stipulated as to the land areas for each district court district and each court of appeal circuit and district (that information will not be reproduced here), that a number of statutes relating to state court judges were enforced by the state prior to receiving Section 5 "preclearance" and that the parties are not aware of the state having any written affirmative action hiring program affecting personnel hired by the state's district courts.

THE APPLICABLE LAW

Because the court finds violations of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, et seq., there is

no need to address the constitutional violations alleged.

Section 2 of the Voting Rights Act requires us to consider the "totality of circumstances":

> A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. (underlining added).

The Senate Report which accompanied the 1982 amendment spelled out factors which typically may be relevant to a

Section 2 claim. As Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed. 2d 25 (1986), points out, the enumerated factors are neither comprehensive nor exclusive. 106 S.Ct. at 2759-60. Moreover, plaintiffs must prove a violation: Electorial devices, such as at-large or multimember elections may not be considered per se violations. When the attack is upon multimember districts Thornburg v. Gingles holds that plaintiffs must prove as preconditions: First that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district, if single-member districts were created; second, that the minority group is politically cohesive; and third, that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances,

usually to defeat the minority's preferred candidate. 106 S.Ct. at 2766.

Although the Court of Appeals squarely held in Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988), that elections for judicial office are subject to Section 2, it cannot be gainsaid that judicial elections are different from other, particularly legislative, elections. Judicial districts are created, not by reason of population, but for the purpose of the administration of justice in a particular jurisdiction. Judgeships are added, not because of population, but because of caseload. The boundaries of district courts are jurisdictional, not related to population. Judges are charged, not with making legislative or social policy, but with the duty of deciding individual

cases according to the law, even when it is unpopular to do so.

Hence, it has been recognized that the "one man-one vote" principle of legislative apportionment does not apply to judicial elections. Wells v. Edwards, 347 F. Supp. 4536 (M.D. La. 1972), aff'd, 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973); see also Voter Information Project v. City of Baton Rouge, 612 F.2d 208 (5th Cir. 1980).

The Supreme Court in Thornburg v. Gingles, was considering a redistricting plan for the North Carolina General Assembly, not judicial elections, when it noted that "the inquiry into the existence of vote dilution caused by submergence in a multi-member district is district-specific." 106 S.Ct. at 2771, n.28. Both sides in this case have presented evidence regarding specific

district court and court of appeal districts and plaintiffs have several times attempted to limit the case to a specific number of designated districts in which they claim Section 2 violations can be proved. Each time the court has declined to permit the limitation because of the court's conviction that the case involves the election system, not just adjustments in individual judicial districts. For example, so long as the district court has only judge, there can be no vote dilution claim. When caseload increases and an additional judgeship is created, however, the potential for vote dilution, as defined by Section 2 and by Thornburg v. Gingles, increases in any district where there is a significant, cohesive minority group. The problem exists because of the election system employed -- all district and family court

judges run district wide, designated by division. All court of appeal judges run district or circuit wide, designated by division if there is more than one judge. A casual review of the statutes indicates that the Louisiana legislature adds one or more district or court of appeal judges at almost every session. Plaintiffs' approach of simply drawing sub-districts in certain multimember districts would require a reapportionment every time an additional judgeship were added. If the method of electing judges (when there are more than one to be elected) leads to vote dilution in some districts, then the remedy should be in the form of modifying the system so that it cannot lead to vote dilution, rather than creating subdistricts or otherwise modifying only certain judicial districts. Obviously, all judicial

elections are held in districts, therefore, it is to the district elections that the court must look to determine whether the election system produces violations of Section 2. If violations are found, however, our task is to revise the system, not to tinker with the "guilty districts." Legislative election districts serve no governmental purpose except equal representation and they are easily revised. District judicial districts are, however, jurisdictional and they serve an important government function which has nothing to do with population.

THE RELEVANT FACTORS

The Senate Report which accompanied the 1982 amendment to Section 2 spelled out seven factors which the report says typically may be relevant to a Section 2 claim. Of course, those factors are

neither exclusive nor comprehensive. The Fifth Circuit has recently made it plain that those factors should be reviewed in vote dilution cases. See Campos v. City of Baton Rouge, 840 F.2d 1240 (1988) and Citizens For A Better Gretna, 834 F.2d 496 (1987). They will be considered here.

1. History of Official Discrimination

Louisiana has a long history of de jure and de facto restrictions on the right of black citizens to register, to vote, and otherwise participate in the democratic process. The court takes judicial notice of that history, is set forth in Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983) (three-judge court), particularly at pages 339-41, which this court adopts by reference. Many of those

factors have been included in the stipulations of the parties in this case.

Defendants argue that only acts of official discrimination undertaken by the state since the adoption of the Voting Rights Act should be relevant on this issue. Defendants correctly point out that since adoption of the federal law there have been few overt official acts of discrimination but the parties have stipulated that since the adoption of the Voting Rights Act, the Department of Justice has sent federal registrars and federal election observers to various parts of Louisiana. The parties have also stipulated that Louisiana has almost routinely enforced statutes relating to judicial elections without complying with the provisions of Section 5 of the Voting Rights Act. Counsel's argument is simply not completely correct. The entire

history of discrimination must be considered although this court certainly acknowledges that there have been improvements made by virtue of the Voting Rights Act of 1965.

I conclude, as did the court in Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983) (three-judge court), that:

> "Louisiana's history of racial discrimination, both de jure and de facto, continues to have an adverse effect on the abilities of its black residents to participate fully in the electorial process." 574 F. Supp. at 339.

2. Racially Polarized Voting

Another of the factors noted by the Senate Report on the 1982 Amendment is whether there exists racially polarized voting. The existence of racially polarized voting in Louisiana has been found by many courts. See, inter alia, Citizens for a Better Gretna v. City of

Gretna, 636 F. Supp. 1113 (E.D. La. 1986), aff'd, 834 F.2d 496 (5th Cir. 1987); Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983) (three-judge court); East Jefferson Coalition for Leadership and Development v. Parish of Jefferson, ___ F. Supp. ___ (No. 86-3668 E.D. La. July 12, 1988).

The expert witnesses of both sides, Dr. Richard L. Engstrom for the plaintiffs and Dr. Ronald E. Weber for the defendants, agreed that there is widespread racial polarization in voting in Louisiana, although they disagreed on its result upon vote dilution. Both of these witnesses utilized the same analytical techniques, bivariate ecological regression analysis and extreme case (homogeneous precinct) analysis to estimate the percentage of voters of each race who voted for the

candidate preferred by black voters. Although their results in each election analyzed by both are extremely compatible, they reached opposition conclusions as to the existence of minority vote dilution.

Dr. Engstrom confined his study to judicial elections in which there were both black and white candidates. He examined only elections in 1978 or later years. He reviewed 31 different district court elections and one court of appeal election, as well as elections for district attorney in Orleans and the Fourth Judicial District (Morehouse and Quachita). He also examined 20 judicial elections involving city court, municipal court or juvenile judges.

Fifteen of the elections Dr. Engstrom examined were for Orleans civil or criminal district judge. Orleans was

also the election district for the one court of appeal election which he examined. The other district court elections examined were: five from the Nineteenth (East Baton Rouge), three from the Fifteenth (Acadia, Lafayette and Vermillion), two each from the First (Caddo), the Ninth (Rapides), and the Eighteenth (Iberville, Pointe Coupee and West Baton Rouge), and one each from the Fourteenth (Calcasieu) and the Twenty-first (Livingston, St. Helena and Tangipahoa). The city and juvenile court elections were all from these same areas except one -- a juvenile court election in the Twenty-fourth District (Jefferson Parish). Thus, Dr. Engstrom analyzed a total of 54 elections held in 9 of Louisiana's 32 district court districts which have more than one judge (there are 9 single-judge districts) and an election

for district attorney in a tenth judicial district. According to Dr. Engstrom, the elections were held in areas which contained 61.5 percent of the state's population and 66.3 percent of the black population (as of the 1980 census).

The districts in which the elections were held and analyzed by Dr. Engstrom include all districts containing more than 100,000 population except three: the Sixteenth (St. Mary, Iberia and St. Martin), the Twenty-second (Washington and St. Tammany) and the Twenty-sixth (Bossier and Webster). The areas include all of Louisiana's largest cities and there are judicial elections from the northwest (First - Caddo), the northeast (Fourth - Quachita, Morehouse), central Louisiana (Ninth - Rapides), Florida parishes (Eighteenth - Iberville, West Baton Rouge and Pointe Coupee, Nineteenth

- East Baton Rouge and Twenty-first - Tangipahoa, St. Helena and Livingston), southwest (Fourteenth - Calcasieu), Acadiana (Fifteenth - Acadia, Lafayette and Vermillion) and southeast (Orleans and Twenty-fourth - Jefferson).

Dr. Engstrom concluded that in 28 of the 32 elections for district court and court of appeal, including Orleans, black voters expressed a preference for black candidates (27 by majority, one by plurality), while white voters never cast a majority or even a plurality for any black candidate. In the other 20 judicial elections which were analyzed, Dr. Engstrom estimated that black voters expressed a preference for black candidates in 19 (one by plurality and 18 by majority). Again, white voters never cast even a plurality for any black candidate.

The parties have stipulated that in 13 judicial districts and several court of appeal districts, the black population is sufficiently large and geographically compact to constitute a majority in at least one single member sub-district. The elections examined by Dr. Engstrom include seven of those districts.

Judicial elections have not recently been held in all judicial districts or in all court of appeal election districts. Accordingly, Dr. Engstrom also performed an analysis of the 1988 Democratic presidential primary[1/] in which the Reverend Jesse Jackson, a black, ran

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[1/] Defendants objected to this because it was a party primary. Louisiana still has many more people registered as Democrats than Republicans, and it was an election at which people actually voted. It provides some useful information -- it at least generally confirms the conclusions suggested by the other elections.

first. Dr. Engstrom estimated that Jackson received 94.6 percent of the black votes statewide but only 2.3 percent of the white votes. He also estimated the vote, by race, in each judicial district in the state and in each court of appeal district. The estimated black vote for Jackson ranged from a low of 82.5 percent in the Second District (Jackson, Claiborne and Bienville) to highs of 100 percent in 15 districts. The estimate of white votes for Jackson ranged from a low of zero in several districts to a high of 13.4 percent in the Third District (Lincoln and Union). The results were about the same when analyzed by court of appeal district. The results correlate closely with the results that Dr. Engstrom estimated in the judicial elections.

Dr. Engstrom's estimates of the black and white vote percentage in the stipulated judicial districts for Jackson in the Democratic primary were:

District	% of Black Votes	% of White Votes
1st (Caddo)	94.6	2.3
4th (Quachita, Morehouse)	94.3	0.0
6th* (East Carroll, Madison & Tensas)	95.2	6.8
9th (Rapides)	100	3.8
14th (Calcasieu)	97.9	2.9
15th (Acadia Lafayette, & Vermillion)	93.7	0.5
18th (Iberville, West Baton Rouge, Pointe Coupee)	97.8	0.0
19th (East Baton Rouge)	97.3	3.6
23rd (Assumption, Ascension, St. James)	100	2.3
24th (Jefferson)	100	2.6
27th (St. Landry)	97	0.0
40th (St. John)	96.1	3.4
Orleans*	96.1	3.4

* Majority black population

In the Twenty-first Judicial District (Tangipahoa, Livingston and St. Helena), a district which was not stipulated as having a sufficient number of blacks and geographic compactness of black voters, but which did have white versus black judicial election on the same date as the Democratic presidential primary, Jackson got an estimated 87.9 percent of the black votes and 2.5 percent of the white votes. In the judicial election, held the same day, the black candidates's black vote was estimated at 79.4 percent and the white vote at 4.6 percent.

In 49 of the 54 elections black voters preferred a black candidate; white

voters never voted even a plurality for a black candidate.[2/]

Dr. Engstrom also analyzed two other elections: the statewide 1987 election for secretary of state in which the names of three black candidates were on the ballot (one of whom withdrew before election day) and the 1986 election in the Eighth Congressional District. This court concludes that the secretary of state election is of little value since there is no evidence that any of the black candidates mounted a serious

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[2/] Defendants suggest, and offered some evidence, that in at least some of the elections, the white vote preference was based upon qualifications or other factors than purely race. The court agrees that some of the white candidates were no doubt conceived by the electorate as better qualified to hold the office of judge then the black candidate. But the fact that in 54 chances white voters never voted even a plurality for the black candidate strongly indicates racial polarization of white voters.

statewide campaign or, even that most voters statewide, were aware of their race. There is no question but that all voters were aware of Jackson's race and that all voters in the congressional election were aware that Williams was a black woman. There was some "cross-over" voting for Williams at about 20 percent and her black support was almost complete in the run-off, which she narrowly lost. Since Dr. Engstrom did not present an analysis of the vote in the judicial districts or the court of appeal election districts, this election is of little value to us other than showing a general predisposition of Louisiana voters in that area to vote by race.

It was Dr. Engstrom's opinion that his analysis shows a pattern of racially polarized voting across the state which is "pronounced and persistent." The

results also show that in most elections the black candidate was the preferred candidate of the black minority but that white bloc voting defeated the black candidate. There were several elections in which the black candidate was not the preferred candidate, for example, one black candidate in East Baton Rouge received only 15.8 percent of the black vote and another only 11.8 percent. In the far greater number of elections analyzed by Dr. Engstrom, however, the black voters preferred the black candidate and majority white bloc voting enabled the white candidate to win.

Defendants vigorously contest Dr. Engstrom's estimation of relative voter "participation" as between black and white voters. He attempted to estimate participation using the number of registered voters in the precinct rather

than actual "turnout" -- voters who actually voted in one or more elections on the ballot on election day. Dr. Engstrom's analysis obviously makes no allowances for the familiar "drop off" in voting from the "top of the ticket" (president, governor) to those considered less important by some voters (judge). Dr. Engstrom's conclusion that the percentage of registered voters who actually vote is lower among black voters than white voters, is, therefore on somewhat shaky ground. Dr. Engstrom extrapolates from this conclusion that even in districts where black voters are in the majority, they can be outvoted by white bloc voting because of greater white participation. While it is certainly logical to assume that a generally less educated, less financially well off group would likely participate

less in civic affairs, including voting, than a better educated, better off group (and there certainly are those disparities between blacks and whites generally in Louisiana) the numbers are certainly not conclusive. Also, the court agrees with defendants' expert, Dr. Renwick, that where there is high black interest in an election, there is likely to be high black "turnout" on election day and that the general public is less interested in judicial elections than those for governor, mayor and other offices.

Dr. Weber, for the defense, analyzed all judicial elections for district court, family court and court of appeal during the period 1976-1988 without regard to the race of the candidate. As noted, he used the same estimating techniques as Dr. Engstrom and he

concluded that the election system does not dilute black voting strength and that black preferred candidates win a "strong majority of the elections being analyzed." Dr. Weber concluded that while there is racial polarization, black voting strength is not diluted by white bloc voting. In an election offering black voters a choice of white candidates, it is not always easy to determine whether there actually is a "black preferred candidate." This Court notes, as did Judge Beer, in East Jefferson, supra, at p. 19, that, "The fact that blacks and whites prefer the same candidate in white only elections, but different candidates when blacks enter the race is strong evidence that racially polarized voting exists."

This Court, on the evidence presented concludes that across Louisiana

and in each of the family court and district court judicial districts as well as in each of the court of appeal districts, there is consistent racial polarization in voting.

Thornburg v. Gingles, supra, suggests that as a precondition, plaintiffs in a vote dilution case must prove that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate. Dr. Engstrom has convinced this Court that the white majority has done so repeatedly in Louisiana judicial elections.

3. Candidate Slating

There is no candidate slating process in Louisiana.

4. Socio-economic Factors

The stipulated facts establish the substantial socio-economic disparities which exist in Louisiana today between blacks and whites. These disparities are a vesture of past discrimination and they do hinder the ability of blacks to effectively participate in the political process. Some of those factors are median family income - $20,867 for whites, $10,459 for blacks; poverty level - blacks comprise 59.95% of all persons below poverty level in Louisiana; median years of school completed - whites 25 years of age and older 12.4, blacks 10.7; unemployment - 2.6% of white persons 16 years and over, 5.7% of blacks (1980 Census figures).

5. Racial Campaign Appeals

Plaintiffs offered evidence of both subtle and overt racial appeals in recent judicial elections in the First Judicial

District, in the Fifteenth Judicial District, in the Nineteenth Judicial District, and in Orleans, as well as in the congressional election. Such appeals still do appear in some white-black campaigns.

6. Extent to which Blacks have been Elected to Office

The parties have stipulated that black citizens comprise about thirty percent of Louisiana's population. Black lawyers now hold only 5 of the 178 district court judgeships and only 1 of 48 court of appeal judgeships.

The parties have stipulated that outside of Orleans Parish there are 156 district court judgeships and there are two black judges (and no more than two) who have been elected and who will be serving in district court judgeships as of June 1988. In Orleans Parish no black

lawyers are currently serving as judges on the criminal district court. Israel Augustine is a black lawyer who was appointed to the criminal district court in 1969. He ran for election in 1970 and was elected as an incumbent judge, defeating two white candidates in the primary. He was unopposed in the general election. He is the only black lawyer (excluding ad hoc appointments) who has served on the Orleans Parish criminal district court in the twentieth century.

Outside of Orleans Parish four black lawyers (and no more than four) have been elected to district court judgeships in the twentieth century in Louisiana. They are: Paul Lynch, First District (Caddo Parish) in 1978, Lionel Collins, Twenty-fourth District (Jefferson Parish) in 1978, Carl Stewart, First District (Caddo) in 1985 and Freddie Pitcher,

Nineteenth District (East Baton Rouge) in 1986.

In the case of Judge Collins, there were special circumstances because he was first appointed to a vacancy and then elected as an incumbent in 1978 in an election in which he had no opposition. Judge Pitcher was elected in East Baton Rouge where this litigation is pending and after this litigation commenced. While the term "aberration," used by one witness to describe Judge Pitcher's victory, is too strong, it is clear that the election must be considered as one under unusual circumstances.

In Orleans Parish three black lawyers currently serve as judges on the civil district court. They are the only black lawyers who have been elected to the Orleans Parish civil district court in the twentieth century. There are a

total of 22 civil and criminal district judgeships in Orleans.

In the twentieth century, only six black judges have been elected to the district court or court of appeal in Orleans. They are: Israel Augustine (Court of Appeal), Ernest Morial (Court of Appeal), Joan Armstrong (Court of Appeal), Revius Ortique, Jr. (Civil District Court), Bernette Johnson (Civil District Court) and Yada McGee (Civil District Court). When Judge Augustine was elected to the Court of Appeal, he was a sitting criminal district judge and he had no opposition. When Judge Morial was elected to the Court of Appeal, he was a sitting Juvenile Court judge - a position to which he had been appointed. Judge Morial was the first black lawyer to be elected to the Court of Appeal in the twentieth century and that election

was in 1972. There has never been more than one black Court of Appeal judge at any one time in the twentieth century in Louisiana.

These facts and the other stipulated facts, together with the testimony presented illustrate the difficulty which blacks have encountered in attempting to be elected to judicial office in Louisiana. They have had more success in Orleans Parish than in any other part of the state. Orleans is an election district for many offices, among them: mayor of the City of New Orleans, council-at-large, civil district judge, criminal district judge, juvenile judge, court of appeal district, civil sheriff, criminal sheriff, clerk of the criminal court. Orleans today is majority black in voter registration (53.17%). The black percentage of voters has steadily

increased and it continues to increase. The Orleans Parish Trial Judges Association has shown that an impressive number of black public officials have been elected parish-wide since 1968. In some of those elections, there were special circumstances, such as some of those mentioned above, however, Orleans has elected an impressive number of black officials, including mayor, council-at-large, school board at-large, civil sheriff, and clerk criminal district court. The last three mayoral campaigns resulted in the election of black mayors. In the last mayor's election (1986), two black candidates made the runoff, while no white candidate made the runoff. The evidence convinces this court that black candidates now have, as plaintiffs' expert, Dr. Engstrom, conceded, a good opportunity to win elections in

Orleans.[3/] The primary reasons for the "minority's" good chance to win in Orleans today, however, is that it is no longer a minority. The evidence still shows racial polarization in voting but not vote dilution now, although there was in the past. Plaintiffs argue that blacks must still be treated as a minority in Orleans in order to overcome the effects of past discrimination. I express no view on that matter except to note that a system change will resolve the issue all over the state and that out of 16 tries, the black judicial candidate

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[3/] As this Court has noted, supra, where the election system produces violations of Section 2, the remedy must be to change the process. In considering claimed Section 2 vote dilution violations involving judicial elections, the court does not focus upon "guilty" and "not guilty" judicial districts, as one does in legislative elections. If the system produces violations, then the system is to be changed.

won three times. Of course, as the black voting majority increases, it will become easier for black judicial candidates to win if Orleans continues to vote on account of race.

If all of us voted without regard to race, the problem would be solved and there could be no claim of a Section 2 violation. That day does not yet seem to have arrived -- even in Orleans.

7. Use of Unusually Large Districts and Other Limitations

The area and population of each district court and each court of appeal circuit and district have been stipulated. Plaintiffs offered the testimony of several recent, unsuccessful, black candidates for judicial office regarding the problems they encountered in mounting district-wide campaigns. More often than not it

is more difficult for black candidates to raise campaign funds than for white candidates. District courts range in size from the smallest, 345 square miles (40th District) to the largest, 2239 square miles (15th District). The court of appeal districts range in size from the largest, 19,344 square miles (Third Circuit, At-large), to the smallest, 350 square miles (Fourth Circuit, District 1-Orleans).

No doubt reducing the size of election districts would make it easier for all candidates, including black candidates to mount more effective campaigns but Louisiana has a valid policy in limiting the number of family courts, district courts and courts of appeal. It would certainly not be desirable to have a district court at every major highway intersection in the

state. A proliferation in the number of district courts could certainly cause administrative problems. Division of the state into five circuit courts of appeal is certainly a reasonable limitation upon the number of circuit courts, considering the many valid reasons for limiting the number of those courts, such as avoiding the potential for conflicting views among the circuits.

I conclude that the district courts are no larger than they need to be. The court of appeal districts are not jurisdictional (except circuit at-large seats) and may be changed by the Legislature. They are simply election districts and Louisiana has no strong public policy reason for maintaining their current size.

The requirement that each judicial candidate qualify for a specific post or

division does limit the ability of black voters to select candidates of their choice, since it results in a "head-to-head" contest in every election.

Louisiana has in the past used anti-single shot provisions and the run-by-division requirement in judicial elections is a functional equivalent.

Louisiana has an open primary with the two top candidates going into the general election. That system does not impede participation.

The Senate Report also suggested that lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group might be a factor in some cases. That obviously is not a factor in this case since the only response which a member of the judiciary may make is to rule on all matters fairly

and impartially, without favoring or being prejudiced against any group.

Thornburg v. Gingles Factors

In Thornburg, the Supreme Court suggests that use of multimember election districts generally will not impede the ability of minority voters to elect representatives of their choice unless the minority is sufficiently large to constitute a majority in a single-member district, that it is politically cohesive and that white bloc voting usually defeats the minority preferred candidate. 106 S.Ct. at 2766.

The drawing of a hypothetical single member subdistrict, as instructed by Thornburg, is not intended to imply that such subdistricts ought to be drawn. Thornburg simply uses this factor as an illustration of the existence of significant vote dilution in a

multimember district because, if the minority cannot constitute a majority in a single member district, the multimember form of the election district cannot be responsible for their inability to elect their preferred candidates.

The parties have stipulated that the black population in a certain number of multimember judicial districts is sufficiently large and geographically compact to constitute a majority in at least one single member subdistrict, if such subdistricts were created. Those districts are:

The Family Court for the Parish of East Baton Rouge;

District courts, 1, 4, 6, 9, 14, 15, 18, 19, 23, 24, 27, 40;

Orleans Parish Civil District Court

Orleans Parish Criminal District Court;

Fourth Circuit, district 1.

Defendants' expert testified that each such subdistrict would have a black voter registration majority as well.

The court finds that in all those districts, and the 21st, the white majority has voted sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate. In Orleans Parish, the minority's preferred judicial candidate has been defeated in 13 of 16 tries in the last ten years. Blacks have fared better in seeking other offices.

In addition, plaintiffs have demonstrated that majority black subdistricts can be created in the following district court and court of appeal districts: 2, 3, 7, 10, 11, 16, 20, 21, 26, 29; First Circuit -- district

3; Second Circuit -- districts 1, 2, and 3; Third Circuit -- districts 1, 2, and 3; Fourth Circuit -- at-large; Fifth Circuit -- district 1. Also, using a circuitwide analysis, plaintiffs have shown that majority black single-member subdistricts could be created in all of the existing circuits of the courts of appeal.

The expert for the defense agreed that majority black single-member subdistricts could be created in all of those districts. With respect to most of them, Dr. Weber testified that the subdistrict would also be majority black in voter registration. In none of them has a black lawyer been elected to a district, family court or court of appeal judgeship. The parties argue back and forth as to whether some of these districts would be contiguous but there

is no doubt that in each of those districts there is a substantial cohesive black minority. It is unnecessary to find a violation in each district in order to determine that Louisiana's judicial elections system had produced and will produce violations of Section 2.

If Louisiana continues to choose judges by popular election, surely it will employ uniform procedures statewide to elect district judges, to elect family court judges, and to elect court of appeal judges. Consequently, this court is convinced that all such elections must be halted while the state determines what procedures will be utilized.

CONCLUSION

The "totality of the circumstances" which are detailed above leads inevitably to the ultimate conclusion that the present use of multimember election

districts and circuit wide election districts in judicial elections affords black citizens "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" in those elections.

Neither the constitution nor the Voting Rights Act requires that black citizens have judicial seats reserved for their candidates or that they be granted judicial posts in proportion to their numbers in the general population. But, where black citizens constitute a significant minority of the population, they are politically cohesive and generally lose because of racial voting patterns, Section 2 violations arise. As plaintiffs point out, even in Orleans Parish, only three lawyers have been elected to district court judgeships in

contested elections although others have been appointed and subsequently elected without opposition, such as Judge Augustine. While blacks do hold some judicial offices in Louisiana, few obtained them by way of contested elections. Almost all were first appointed and subsequently unopposed. Those who campaigned in contested elections were almost always defeated by white majority bloc votes, despite strong support from the black minority.[4/]

Although minority vote dilution was not proved in each of the 41 district court districts or in all of the court of appeal districts, racial polarization in voting in all types of elections, including judicial elections, was clearly

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[4/] The court again acknowledges that it will become easier for blacks to be elected to any office in Orleans as the black voter majority increases.

established statewide. It was also established that in those districts where the minority has fielded candidates, the majority white bloc vote has almost always defeated the minority candidate and that Louisiana's election system prevents the minority from making its voting strength effective. These facts indicate that in multimember judicial districts where the minority vote is a substantial part of the voting population and is politically cohesive, the minority has less opportunity to participate in the process. Even though no specific Section 2 violation may exist in a particular district at this time, the system employed by the state will allow the creation of a violation, given time.

The remedy is to revise the system -- to cast about for alternative procedures under which black voters would

have a better chance to elect judicial candidates of their choice.

There are many alternatives which may be considered. This Court has no preconceived notion as to what changes the Governor and the Legislature ought to make. This Court is simply convinced that the present system of electing family court, district court, and court of appeal judges in Louisiana has produced violations of Section 2 of the Voting Rights Act and that it will continue to produce violations unless it is changed.

Accordingly, the preliminary injunction previously issued will be made permanent and will be expanded to enjoin all family court, district court, and court of appeal elections until revisions in the electorial process are made.

Baton Rouge, Louisiana, August 15, 1988.

/s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

ATTACHMENT A

Louisiana: District court judges per judicial district, parishes comprising judicial districts, and total, black, and black percent populations per parish and judicial district.

District	# of Judges	Parishes	Population		
			Total	Black	%Black
1	9	Caddo	252,358	95,242	37.7
2	3	Jackson	17,321	5,522	31.9
		Claiborne	17,095	8,002	46.8
		Bienville	16,387	6,939	42.3
		Total	50,803	20,463	40.3
3	2	Lincoln	39,763	14,590	36.7
		Union	21,167	6,166	29.1
		Total	60,930	20,756	34.1
4	7	Ouachita	139,241	40,582	29.1
		Morehouse	34,803	13,980	40.2
		Total	174,044	54,562	31.3
5	3	West Carroll	12,922	2,099	16.2
		Richland	22,187	7,851	35.4
		Franklin	24,141	7,735	32.0
		Total	59,250	17,685	29.8
6	2	East Carroll	11,772	7,201	61.2
		Madison	15,975	9,364	58.6
		Tensas	8,525	4,659	54.7
		Total	36,272	21,224	58.5
7	2	Catahoula	12,287	3,175	25.8
		Concordia	22,981	8,056	35.1
		Total	35,268	11,231	31.8
8	1	Winn	17,253	4,873	28.2
9	6	Rapides	135,282	36,308	26.8
10	2	Natchitoches	39,863	14,450	36.3
11	2	DeSoto	25,727	11,556	44.9
		Sabine	25,280	4,694	18.6

		Total	51,007	16,250	31.9
12	2	Avoyelles	41,393	10,532	25.4
13	2	Evangeline	33,343	8,027	24.1
14	8	Calcasieu	167,223	36,284	21.7
15	11	Acadia	56,427	9,902	17.5
		Lafayette	150,017	30,334	20.2
		Vermilion	48,458	6,425	13.3
		Total	254,902	46,661	18.3
16	7	St. Mary	64,253	18,515	28.8
		Iberia	63,752	17,640	27.7
		St. Martin	40,214	13,185	32.8
		Total	168,219	49,340	29.3
17	4	La Fourche	82,483	9,127	11.1
18	4	Iberville	32,159	15,414	47.9
		West Baton Rouge	19,086	7,626	40.0
		Pointe Coupe	24,045	10,001	41.6
		Total	75,290	33,041	43.9
19	13	East Baton Rouge	366,191	114,741	31.3
20	2	E. Feliciana	19,015	9,240	48.6
		W. Feliciana	12,186	7,061	57.9
		Total	31,201	16,301	52.2
21	6	Tangipahoa	80,698	24,295	30.1
		Livingston	58,806	3,952	6.7
		St. Helena	9,827	5,059	51.5
		Total	149,331	33,306	22.3
22	6	Washington	44,207	13,308	30.1
		St. Tammany	110,869	13,861	12.5
		Total	155,076	27,169	17.5
23	4	Assumption	22,084	6,995	31.7
		Ascension	50,068	11,262	22.5
		St. James	21,495	10,156	47.2
		Total	93,647	28,413	30.3
24	15	Jefferson	454,592	63,001	13.9

25	2	Plaquemines	26,049	5,540	21.3
26	4	Bossier	80,721	15,236	18.9
		Webster	43,631	13,937	31.9
		Total	124,352	29,173	23.5
27	4	St. Landry	84,128	31,965	38.0
28	1	LaSalle	17,004	1,585	9.3
29	3	St. Charles	37,259	9,499	25.4
30	2	Vernon	53,475	9,764	18.3
31	1	Jefferson Davis	32,168	6,146	19.1
32	5	Terrebonne	94,393	14,598	15.5
33	1	Allen	21,390	4,383	20.5
34	3	St. Bernard	64,097	2,411	3.8
35	1	Grant	16,703	2,840	17.0
36	1	Beauregard	29,692	4,756	16.0
37	1	Caldwell	10,761	1,969	18.3
38	1	Cameron	9,336	524	5.6
39	1	Red River	10,433	3,797	36.4
40	2	St. John the Baptist	31,924	12,175	38.1
Orleans Parish Civil	12	-	557,515	308,149	55.3
Orleans Parish Criminal	10	-	557,515	308,149	55.3

ATTACHMENT B

Louisiana: Courts of Appeal judges per judicial district, parishes comprising districts, and total, black, and black percent populations per parish and judicial district.

# of Judges	Parishes	Population Total	Black	%Black
FIRST CIRCUIT				
District 1				
4	Ascension	50,068	11,262	22.5
	Assumption	22,084	6,995	31.7
	Iberville	32,159	15,414	47.9
	Lafourche	82,483	9,127	11.1
	Pointe Coupee	24,045	10,001	41.6
	St. Mary	64,253	18,515	28.8
	Terrebonne	94,393	14,598	15.5
	W.Baton Rouge	19,086	7,626	40.0
	Total	388,571	93,538	24.1
District 2				
4	E. Baton Rouge	366,191	114,741	31.3
District 3				
4	E. Feliciana	19,015	9,240	48.6
	Livingston	58,806	3,952	6.7
	St. Helena	9,827	5,059	51.5
	St. Tammany	110,869	13,861	12.5
	Tangipohoa	80,698	24,295	30.1
	Washington	44,207	13,308	30.1
	W. Feliciana	12,186	7,061	57.9
	Total	335,608	76,776	22.9
Total judges 12				

SECOND CIRCUIT

District 1

2	E. Carroll	11,772	7,201	61.2
	Franklin	24,141	7,735	32.0
	Madison	15,975	9,364	58.6
	Morehouse	34,803	13,980	40.2
	Ouachita	139,241	40,582	29.1
	Richland	22,187	7,851	35.4
	Tensas	8,525	4,659	54.7
	W. Carroll	12,922	2,099	16.2
	Total	269,566	93,471	34.7

District 2

2	Bienville	16,387	6,939	42.3
	Bossier	80,721	15,236	18.9
	Caldwell	10,761	1,969	18.3
	Claiborne	17,096	8,002	46.8
	Jackson	17,321	5,522	31.9
	Lincoln	39,763	14,590	36.7
	Union	21,167	6,166	29.1
	Webster	43,631	13,937	31.9
	Winn	17,253	4,873	28.2
	Total	264,099	77,234	29.2

District 3

2	Caddo	252,358	95,242	37.7
	DeSoto	25,727	11,556	44.9
	Red River	10,433	3,797	36.4
	Total	288,518	110,595	38.3

At Large

1		822,183	281,300	34.2

THIRD CIRCUIT

District 1

2	Avoyelles	41,393	10,532	25.4
	Catahoula	12,287	3,175	25.8
	Concordia	22,981	8,056	35.1
	Grant	16,703	2,840	17.0
	LaSalle	17,004	1,585	9.3
	Natchitoches	39,863	14,450	36.2

		Rapides	135,282	36,308	26.8
		Sabine	25,280	4,694	18.6
		Total	310,793	81,640	26.3
District 2					
	2	Allen	21,390	4,383	20.5
		Beauregard	29,692	4,756	16.0
		Calcasieu	167,223	36,284	21.7
		Cameron	9,336	524	5.6
		Jeff'n Davis	32,168	6,146	19.1
		Vernon	53,476	9,764	18.3
		Total	313,285	61,857	19.7
District 3					
	2	Acadia	56,427	9,902	17.5
		Evangeline	33,343	8,027	24.1
		Iberia	63,752	17,640	27.7
		Lafayette	150,017	30,334	20.2
		St. Martin	40,214	13,185	32.8
		St. Landry	84,128	31,965	38.0
		Vermilion	48,458	6,425	13.3
		Total	476,339	117,478	24.7
At Large					
	3	-	1,100,417	260,975	23.7
FOURTH CIRCUIT					
District 1					
	8	Orleans	557,515	308,149	55.3
District 2					
	1	Plaquemines	26,049	5,540	21.3
District 3					
	1	St. Bernard	64,097	2,411	3.8
At Large					
	2		647,661	316,100	48.8

FIFTH CIRCUIT

District 1					
	6	Jefferson	454,592	63,001	13.9
District 2					
	1	St. James	21,495	10,156	47.2
		St. John the Baptist*	27,882	8,685	31.1
		Total	49,377	18,841	38.2
District 3					
	1	St. Charles	37,259	9,479	25.4
		St. John the Baptist*	4,042	3,490	86.3
		Total	41,301	12,969	31.4

*A portion of St. John the Baptist Parish is in District 2 and a portion is in District 3.

In addition to the judgeships listed above, other Court of Appeals judgeships have been added by Act 801 of the 1987 Regular Session of the Louisiana legislature. That act adds one additional judge for the Second Circuit, to be elected at-large from the entire circuit, and three additional judges for the Third Circuit, one to be elected from each of the three districts in the circuit. The act specifies that the elections for these judgeships shall be held in the fall of 1988, with the persons elected taking office January 1, 1989. Act 801 has been submitted to the United States Department of Justice for preclearance under Section 5 of the Voting Rights Act. As of March 22, 1988, the Department of Justice had taken no action of the request for preclearance.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

Minute Entry:
August 31, 1988
Parker, C.J.

JANICE G. CLARK, ET AL CIVIL ACTION

VERSUS

NO. 86-435-A

CHARLES "BUDDY" ROEMER, ET AL

* * * * * * * * * *

This matter is before the court upon: (1) a motion by plaintiffs to amend the findings of fact and conclusions of law, (2) a motion by the state defendants and intervenor, the Louisiana District Judges Association for a stay of the order of injunctive relief or in the alternative, a motion for modification of the injunction and (3) a motion by defendant-intervenor, the Orleans Trial

Judges Association for a stay of the order of injunction pending appeal.

Motion to Amend Findings of Fact and Conclusions of Law

No judgment has yet been signed in this case and accordingly the court may amend the findings and conclusions in its discretion. Rule 52B, Fed.R.Civ.P.

Plaintiffs request clarification of the statement on page 25 of the court's findings and conclusions that, "The city and juvenile court elections were all from these same areas . . . ." Plaintiffs assert that the statement omits a judicial election in the Fourth Judicial District which was analyzed by Dr. Engstrom. Defendants respond that they do not object to amending the court's findings, "to include the 1984 city court election in Monroe." The referenced statement is unclear. The

court intended to include the election for district attorney which was held in the Fourth Judicial District and which was also analyzed by Dr. Engstrom. In addition, Dr. Engstrom actually examined two city court elections in the Fourth Judicial - 1984 elections in Bastrop (Morehouse Parish) and Monroe (Quachita Parish). The findings and conclusions are hereby amended so as to make that clear.

Plaintiffs also assert that the findings and conclusions do not clearly reflect the specific districts in which the court has found that the system utilized by the state of Louisiana in electing its family court, district court, and court of appeal judges has produced violations of Section 2 of the voting Rights Act of 1965. Defendants request that the court also specifically

list those districts in which no violation is found and complain that the court failed to specifically note that the Sixth and Twentieth Judicial Districts are presently majority black.

The findings and conclusions in this regard are somewhat unclear. Although the court did note in its chart on page 28 that the Sixth Judicial District (East Carroll, Madison and Tensas) and Orleans Parish are currently majority black in population, it did not make any specific reference to the Twentieth Judicial District (East and West Feliciana) which, according to the stipulation of the parties was 52.2% black according to the 1980 Census.

The court should have made it plain that the Sixth Judicial District, with two district judges, falls into a category similar to that of Orleans

Parish. Although there is a majority black population, there is strong evidence of racial polarization in voting and white majority bloc voting can usually prevent the preferred black candidate from winning. Accordingly, it is included in the list of those districts in which the court found Section 2 violations.

The court intended to state that it found violations in every district listed on page 38 and 39. Apparently, it did not clearly do so. In order to make it plain, the court finds that the system utilized by the state to select its judges has produced violations of Section 2 of the Voting Rights Act in the following districts.

The Family Court for the Parish of East Baton Rouge;

District Courts 1, 2, 3, 4, 6, 7, 9, 10, 11, 14, 15, 16, 18, 19, 20, 21, 23, 24, 26, 27, 29 and 40;

Orleans Parish Civil District Court;

Orleans Parish Criminal District Court;

Court of Appeal Districts: First Circuit, Districts 2 and 3;

Second Circuit, Districts 1, 2 and 3;

Third Circuit, Districts 1, 2 and 3;

Fourth Circuit at-large;

Fourth District, District 1;

Fifth Circuit, District 1;

using a circuit-wide analysis, all five of the existing circuit courts of appeal.

Although judicial elections were not held in all of the cited districts, there was at least one election in each judicial district. As Thornburg v.

Gingles comments, a pattern of racial bloc voting that extends over a period of time is more probative of legally significant polarization than are the results of a single election. The court further notes, however, that:

> When a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electorial process.
> 106 S.Ct., n.25 at 2770.

The elections which were presented to the court are sufficient to sustain the finding that there is a state-wide pattern of racially polarized voting which, according to Dr. Engstrom, is "pronounced and persistent." Some of the other factors in districts where no evidence of minority elections was presented are discussed in the findings and conclusions. These include the substantial socio-economic disparities

between whites and blacks in Louisiana, the testimony of black judicial candidates as to the difficulties they encounter in raising campaign funds and otherwise mounting effective campaigns, the existence of racial appeals in campaigns, the very small number of blacks who have been elected to judicial office anywhere in Louisiana, the election of some circuit judgeships circuit-wide with one circuit (the 3rd) nearly 20,000 square miles in area and the use of the qualification by division requirement which is the functional equivalent of an anti-single shot provision.

No specific violation is found in any of the remaining district court districts.

Motions for Stay of the Injunction

The state defendants and both intervenors, the Louisiana District Judges Association and the Orleans Trial Judges Association, move that the injunction be stayed pending appeal in order to allow certain elections now scheduled for October 1, 1988 to occur.

The court has already authorized the printing of all ballots for these judicial elections in the event that the parties are successful in convincing the Court of Appeals to modify the injunction.

According to the information submitted by the defendants, there are five district court elections scheduled for October 1, 1988 and all involve vacancies for which there are no incumbents. Those district court elections are:

Fourth Judicial District Court (Quachita and Morehouse), a district in which the court specifically found a Section 2 violation;

Seventeenth Judicial District Court (LaFourche), a district in which no specific violation was found;

Twenty-second Judicial District Court (St. Tammany and Washington), a district in which no specific violation was found but the judgeship was created by a 1970 Act of the Legislature which the state failed to timely submit to the United States Attorney General under Section 5 of the Voting Rights Act and which has not been "precleared;"

Twenty-fourth Judicial District Court (Jefferson), a district in which a specific violation has been found; and

Twenty-Sixth Judicial District Court (Bossier and Webster), a district in

which a specific violation has been found.

As to court of appeal judgeships, it should be noted that the court has found a violation in each of the five circuit courts of appeal, although not in every district within circuits, as presently constituted.

Act 801 of 1987 created the following court of appeal judgeships:

Second Circuit at-large;
Third Circuit, Districts 1, 2, 3, Division "C" in each district.

This statute was eventually submitted by the state to the United States Attorney General under Section 5 of the Act but it has not been "precleared." Obviously, all of these judgeships are vacant.

Thus, under Section 5, the holding of elections for four court of appeal

judgeships and one district judgeship is prohibited. The three-court judge has issued its own injunction against holding elections for judgeships created under Act 801 of 1987 and Act 23 of 1970.

In the following court of appeal elections, according to the defendants, there is no incumbent running for an existing vacancy:

Second Circuit, District 1, Division "A";

Fourth Circuit, District 1, Division "B."

If the court has correctly interpreted what the defendants are saying, only the following court of appeal elections are regularly scheduled elections where, apparently, an incumbent is running for re-election:

First Circuit, District 1, Division "A";

Third Circuit, at-large;

Fourth Circuit, District 1, Division "C."

Both the state defendants and intervenors rely heavily upon the recent opinion of the Fifth Circuit in Chisom v. Edwards (Chisom II), which modified a district court injunction against the holding of a presently scheduled election for Justice of the Supreme Court of Louisiana. All defendants argue that there is no irreparable injury which has been established by the plaintiffs.

Initially, it needs to be made plain that this case has been tried on the merits and the court has rendered a decision on the merits making specific findings of fact and conclusions of law in regard to specific violations of Section 2 of the Voting Rights act of 1965. This is not a motion for a

preliminary injunction and the preliminary injunction has been subsumed by a permanent injunction. After trial on the merits, the focus changes regarding injunctive relief. Nevertheless, any injunction is a very serious remedy. As the Fifth Circuit noted in Posada v. Lamb County, Texas, 716 F.2d 1066 (1983), a Voting Rights case:

> Permanent injunctions are never lightly given. They are hedged about with circumspection: to win one, a petitioner must show a clear threat of continuing illegality portending immediate harmful consequences irreparable in any other manner. . . But cognizance of comity does not command abstinence. Encroachments on the exercise of the civil liberties secured by the Constitution are barred no less when threatened by majoritarian domination of the political organs of the state. (716 F.2d at 1070)

In State, et rel, Guste v. Lee, 635 F.Supp. 1077 (E.D. La. 1986), Judge McNamara pointed out that determination

of the immediate harmful consequences requires an examination as to whether successful plaintiffs have any adequate remedy at law:

> In ascertaining the propriety of permanent injunctive relief, a court should consider;
> (1) whether Plaintiff has succeeded on the merits;
> (2) whether Plaintiff has an adequate remedy at law;
> (3) the public interest;
> (4) the balancing of equities.
> 635 F.Supp. at 1125.

Here there is no question but that plaintiffs have succeeded on the merits. Clearly, plaintiffs have no adequate remedy at law. The public interest is clearly in favor of the discontinuing of an election system which the court has found illegal and surely in a balance of equities, where the court has found encroachments on the exercise of the civil liberties specifically provided by the Voting Rights Act of 1965, the state

can have no legitimate interest in continuing with a system that causes such encroachment.

Moreover, as previously noted, all but three of the scheduled elections involve judgeships which are currently vacant. Defendants argue strongly that failure to fill these judgeships will create an increased caseload and hardship on my state court brothers. The Supreme Court of Louisiana has specific statutory authority in Article 5, Section 22B of the Louisiana Constitution of 1974 to fill all vacancies, either newly created or otherwise, pending election. The defendants argue that because the person appointed to fill a vacancy cannot subsequently become a candidate when the election is held, the Supreme Court may have difficulty obtaining qualified persons who are willing to serve in these

vacancies. This court is fully aware that the Supreme Court also has power under Article 5, Section 5(A) of the Constitution of 1974 which provides without qualification that the court "may assign a sitting or retired judge to any court." See State of Louisiana v. Bell, 392 So.2d 442 (La. 1981). The Supreme Court frequently uses retired judges to provide additional judicial help where needed, even when there are no vacancies and retired judges are most unlikely to become candidates. Accordingly, it is difficult for this court to see how hardship can be imposed upon the state when these vacancies can be filled temporarily until a lawful election can be held.

As to the three elections which apparently involve incumbents running for

re-election, LSA-R.S. 42:2 specifically provides:

> Every public officer in this state except in case of impeachment or suspension, shall continue to discharge the duties of his office until his successor is inducted into office.

The decision in Chisom II questions whether this provision applies to a justice of the Supreme Court of Louisiana and discusses extensively the problems that might be caused in close cases, should the capacity of the incumbent justice be questioned. This court has carefully reviewed the Fifth Circuit's opinion in Chisom II, but concludes that court of appeal judges must clearly be "public officers" under the state statute every bit as much as they are "representatives" under Section 2 of the Voting Rights Act. Chisom v. Edwards, 835 F.2d 1056, 1059-60 (5th Cir. 1988)

(Chisom I). Accordingly, this court concludes that there can be no doubt that these judges can continue in office pending the holding of a lawful election.

Chisom II emphasizes that federal courts, even after finding a violation of federal law, should look initially to the state to provide a remedy prior to attempting to fashion its own remedy. The record of this action will show that the undersigned judge has, throughout this case, made the same assertion. Having found violations, the court has called upon the Governor and the Legislature to fashion a remedy. Although the parties will be allowed to submit proposals, the court will not attempt to fashion any remedy until the state authorities report that they are unable or unwilling to do so. There is no indication that the state authorities

will decline; on the contrary, there are indications that the Governor and the Legislature intend to take up the matter and report to the court before January 31, 1989.

The regular judicial elections are scheduled for 1990. There is ample time to fashion a revised system for selection of Louisiana judges and have it in place well before the time for those elections. Chisom II refers us to Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362 (1964) for its teaching of federal caution in enjoining state elections. The Supreme Court there stated:

> . . . It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such as where an impending election is

> imminent and State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. . .
> 84 S.Ct. at 1394.

Although this court in its findings and conclusions has carefully pointed out the difference between state judicial districts and legislative reapportionment schemes, the same reasoning applies to injunctive relief in judicial elections.

The record in this case will show that on several occasions prior to trial on the merits, this court declined to enjoin state judicial elections. The motion to enjoin the present elections

was filed long before trial on the merits and was well known to all parties. The injunction came as no surprise. The main judicial elections will be in 1990. The few elections covered by the injunction here will not impose a hardship upon the state judicial system (5 of the 15 elections are also subject to the injunction of the three-judge court) and this is not the unusual case in which the court is justified in not taking appropriate action to insure that no further elections are conducted under the invalid system.

The defendants argue that this court finds per se violations contrary to Section 2 itself and Thornburg v. Gingles with its view stated in the findings and conclusions regarding the need to revise the election system, rather than tinkering with "guilty" judicial

districts. The Court of Appeals might decide that judicial districts should be treated as though they were legislative districts for Section 2 purposes. This court can only repeat what it has said many times already. State district court districts are jurisdictional. They may not be redrawn, combined and manipulated in the same fashion as legislative districts. There are grave problems in attempting to create sub-districts within a district court jurisdiction. Tinkering with the districts is not the answer. The system in its entirety, multi-member districts, running by division, large court of appeal districts, and all the other factors discussed in the findings and conclusions contribute to the dilution of minority voter strength and, it is this court's firm conviction that

it is the system that ought to be revised.

Having found that the system of electing Louisiana family court, district court, and court of appeal judges violates Section 2 of the Voting Rights Act and having issued a permanent injunction against holding elections under that system, the court would be completely inconsistent in modifying the injunction so as to permit elections under the system which has been found in violation of federal law.

Accordingly, the motions filed on behalf of all parties for a modification of the injunction are hereby DENIED.

/s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

JANICE G. CLARK, ET AL — CIVIL ACTION

VERSUS — NO. 86-435-A

CHARLES "BUDDY" ROEMER, ET AL

FINDINGS OF FACT AND CONCLUSIONS OF LAW
REMEDY PHASE
[Entered June 12, 1990]

A. PRELIMINARY STATEMENT

In view of the holding of the Fifth Circuit in Chisom v. Edwards, 839 F.2d 1056 (5th Cir.) cert. denied sub nom. Roemer v. Chisom, _____ U.S. _____, 109 S.Ct. 390, 102 L.Ed.2d 379 (1988), this Court assumed that its path was rather clearly staked by the appellate court. However, on May 11, 1990, the

decision of the Fifth Circuit came down in League of United Latin Am. Citizens Council No. 4434 v. Clements, 1990 WL 60637 (5th Cir. May 11, 1990, No. 90-8014, 89-8095). That case effectively undercuts the teaching of Chisom because it holds that, although Section 2 of the Voting Rights Act, 42 U.S.C. §1973, does indeed apply to judicial elections, the use of at-large election districts in the election of Texas trial judges does not violate Section 2. Since Louisiana's trial judges are also elected at-large, that holding, if it becomes final, will have a significant impact upon the decision which this court must hand down in this Louisiana case.

This case has been tried and decided on the violation issues and the Louisiana Legislature was granted time to present a remedy which the Legislature failed to

do. This case has also been tried on the remedy phase and the court was on the verge of presenting its decision on the remaining issues when the decision in the Texas case came down. The Fifth Circuit has now granted rehearing en banc in the Texas case which has the effect of vacating the opinion of the panel. League of United Latin Am. Citizens Council No. 44346 v Clements, 1990 WL 62721 (5th Cir., May 16, 1990, No. 90-8014). The Fifth Circuit has scheduled oral argument for June 19, 1990. The LULAC opinion is thus suspended and as of this writing, the only appellate guidance available to this court is Chisom v Edwards.

Under ordinary circumstances this court would simply delay its decision pending final appellate court judgment. These are not ordinary circumstances,

however. The court has concluded that delaying its decision in this case would disserve the cause of justice. Some of the factors which lead to this conclusion are:

Louisiana has judicial elections scheduled generally in 1990. Time is required to gear up for those elections both by the candidates and the state officials charged with conducting the elections. There are vacancies in the state judicial system which need to be filled but which, because of the state's consent injunction, cannot be filled. As will be seen, infra, this court does not find a Section 2 violation in every district and it is imperative that elections be allowed to proceed free of federal interference in those districts in which no Section 2 violation is found.

Throughout the course of this litigation, this court has marched to the solitary beat of its own drum, insisting that if Louisiana's system for selecting its judges produces violations of Section 2 of the Voting Rights Act, the remedy should be to revise the system, not to make adjustments in a few "guilty" districts which may well need adjusting again in the future. (See, for example, the views expressed at 725 F. Supp. at 294-295) None of the parties -- plaintiffs, defendants, or intervenors -- have joined the court's march. Each insists that, as a finding of a Section 2 violation is district specific, so any remedy must also be limited to districts in which specific violations have been

found.[1/] For reasons stated later, the court concludes that it lacks the power to impose a systemic remedy upon the state and that any remedy is indeed limited to "guilty" districts. Both the parties and the appellate court need to be aware of this court's findings of fact. If, because of the Fifth Circuit's resolution of the Texas case, revisions in this Court's conclusions of law are required, so be it. Accordingly, it is imperative that the state be permitted to fill judicial vacancies as rapidly as possible, in these districts in which no violation is found.

B. BACKGROUND OF CASE

[1/] This is not the argument advanced by the Louisiana Organization for Judicial Excellence, amicus curiae, however. Their argument is set forth in more detail later.

This is a class action brought by black voters and black lawyers who possess the qualifications to be elected to the offices of Louisiana district judge, family court judge and court of appeal judge. Plaintiffs claim that the use by Louisiana of multimember election districts to elect these judicial officers operates to dilute black voting strength in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973. Plaintiffs also assert claims of racial voter discrimination under the Fourteenth and Fifteenth Amendments Trial was had on the liability issues and the court concluded that the use of multimember election districts has indeed produced violations of Section 2 of the Voting Rights act in some of Louisiana's judicial districts. In view of the finding of statutory violations,

the Constitutional claims were not addressed. See Clark v. Edwards, 725 F.Supp. 285 (M.D. La. 1988).

On December 15, 1988, the State of Louisiana requested and was granted time to attempt to structure remedial legislation during the 1989 Regular Session of the Legislature and for such additional time as might be required to submit to the electorate any amendments to Louisiana's Constitution which might be required relative to revising the State's judicial selection process. Plaintiffs opposed the request.

At the same time, the State consented to an injunction which prohibits filling by election positions "now vacant" for the family court, district courts and courts of appeal, "pending the issuance of further orders by this Court."

It should also be noted that a three-judge court was convened in this case under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, because Louisiana had created judgeships and had taken other actions regarding judicial election procedures which had not been submitted for approval to either the Attorney General of the United States or to the United States District Court for the District of Columbia, Allen v. State Board of Elections, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969). The three-judge court enjoined implementation of a number of such changes and the State authorities proceeded to submit a number of such changes to the Attorney General. In due course, letters of "no objection" issued as to several changes which the State was then allowed to implement. On September 27, 1938, the three-judge court

enjoined the implementation of La. Act 801 of 1987 which created four new judgeships in the Second and Third Circuit Courts of Appeal. That injunctive order was predicated upon the formal objection of the Attorney General to implementation of Act 801. That injunctive order remains in effect and will be unaffected by any order of this single judge court. See Allen v. State Board of Elections, supra.

Eventually, the Legislature did come up with a number of specific changes in judicial election procedures in some judicial districts. Some of the changes required revisions to Louisiana's Constitution and, under the direction of the Legislature, the entire "package" was submitted to a vote of the people of Louisiana. In November, 1989, the people rejected the proposed revisions. The

Legislature has submitted nothing to this court.

The matter has now been heard on the remedy phase and numerous proposals have been presented to the court by the original parties as well as by a host of intervenors. Other proposals have been submitted by way of amicus curiae briefs, mostly on behalf of individual courts. As noted, however, no proposal has been submitted by the Louisiana Legislature.

C. PENDING MOTIONS

Shortly before trial, a motion was filed on behalf of the Governor and other State defendants to "Recall and Recast Findings of Fact and Conclusions of Law as Entered on the 15th Day of August, 1988." Also, shortly before trial, The Orleans Trial Judges Association, as intervenor, filed a motion to reconsider the court's findings as to Orleans Parish

(Orleans Civil and Criminal District Courts). Both motions were taken up at trial and are submitted on the record as made at the original trial and the trial on remedy. Plaintiffs vigorously oppose both motions. The motions present several issues.

Issues similar to those presented hereby were raised regarding Louisiana's system for electing justices of its Supreme Court in Chisom v. Edwards, 839 F.2d 1056 (5th Cir.) cert. denied sub nom. Roemer v. Chisom, ____ U.S.____, 109 S.Ct. 390, 102 L.Ed.2d 379 (1988). There the district court held that Section 2 of the Voting Rights Act, as amended, did not apply to judicial elections. The Fifth Circuit reversed, holding:

> "Clearly, judges are 'candidates for public or party office ' elected in a primary, special, or general election; therefore, section 2, by its

> express terms, extends to state judicial elections. This truly is the only construction consistent with the plain language of the Act."
> 839 F.2d at 1060.

Thus, under Chisom, this court is bound to apply the provisions of Section 2 of the Act to the judicial elections at issue in this litigation. So long as Louisiana chooses to select its judges by popular election, the elections must all be conducted in accordance with Section 2, which forbids the states from using any voting standard or practice, "which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color . . . ." The Act goes on to specifically recognize claims of vote dilution as a violation of the statute. The 1982 amendment to the Act rejects the "intent to discriminate"

test in favor of the "results" test. If, under the "totality of circumstances" it is established that "the political processes . . . are not equally open to participation by . . . [a protected minority] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" then a violation of the Act has been shown. In Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the Supreme Court explained the requirements for a vote dilution case under Section 2. In view of the square holding in Chisom that Louisiana's judicial elections fall within the requirements of Section 2 of the Act, it is appropriate that the court apply the teachings of Thornburg to determine whether plaintiffs have proved

any violations. That is what the court did following the trial on liability issues.

The decision in League of United Latin Am. Citizens v. Clements, supra, is predicated upon the notion that trial judges hold "single-member" offices, more closely akin to offices such as president or governor or mayor than to multi-member bodies such as legislature or municipal councils or school boards. Noting that each district (trial) judge individually hears and decides each case on his own docket without consultation or input from any other district (trial) judge in the judicial district, regardless of the number of judges for that district, the panel concludes that there can be no violation in the at-large election of such officers: "There cannot be a violation of Section 2(b) . . . through

at-large elections of the trial judges who sit on the Texas district courts . . . ." This is so, the panel reasons, because," . . . the full authority of a trial judge's office is exercised exclusively by one individual, and there can be no share of such a single-member office." (slip op. at 4087)

This reasoning apparently would not extend to appellate court judges who do decide cases in panels, one vote each. The reasoning would, however, squarely apply to Louisiana's district (trial) judges since their functions are exercised in precisely the same manner as are those in Texas and they are elected district-wide (at least one parish in every judicial district). This court is not moved to embrace the reasoning of the panel in the Texas case at this time for two reasons: - (1) the decision is not

final; indeed, it is at present suspended; and (2) no party to this litigation has at any time advanced the reasoning of the Texas case. An additional factor is that court of appeal judges are involved in this case, hence claimed Section 2 violations must be dealt with at that level in any event. This court can find no applicable teaching to use in determining whether Section 2(b) violations have been proved except Thornburg v. Gingles and that standard will be applied.

This court must admit that its discussion of the Thornburg threshold factors was minimal at best. The Fifth Circuit on more than one occasion has stressed the need for district courts to make specific, detailed findings of fact in vote dilution cases. See e.g., Westwego Citizens For Better Government

v. City of Westwego, 872 F.2d 1201 (5th Cir. 1989). Because the court's findings of fact were not sufficiently specific as to all judicial districts, the court will reconsider its findings and will make additional findings. All previous findings are adopted, except as they may be specifically changed herein.

D. THE APPLICABLE LAW

Several matters need to be addressed before undertaking a district by district review of the evidence.

In Thornburg v. Gingles, the Supreme Court made it plain that plaintiffs in a vote dilution case bear the burden of proving that "the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates." 106 S.Ct. at 2765. The Court also made it plain that three factors must be established before

it becomes necessary to undertake an examination of the totality of the circumstances (the so-called "Zimmer" factors): (1) The minority group must be sufficiently large and geographically compact to constitute a (voting) majority in a single-member district; (2) The minority group must be politically cohesive; and (3) The minority must demonstrate that the white majority votes sufficiently as a bloc to enable the majority to usually defeat the cohesive minority's preferred candidate. While satisfying these threshold factors does not prove a violation of Section 2, failure to establish all of them may eliminate the necessity to even conduct a totality of the circumstances examination. Monroe v. City of Woodville, Miss., 881 F.2d 1327 (5th Cir. 1989), on petition for rehearing, 897

F.2d 763 (5th Cir. 1990); Overton v. City of Austin, 871 F.2d 529 (5th Cir. 1989).

Although the Fifth Circuit has apparently not yet squarely so held, it seems rather clear that the majority population with which Thornburg v. Gingles is concerned is a voting majority, not simply a population majority. The Court of Appeals has at least implied that the single-member district which is created must contain at least a voting age majority of the minority group. See Houston v. Haley, 859 F.2d 341 (5th Cir. 1988), vacated on other grounds, 869 F.2d 807 (1989), (where the court referred to this issue as "critical"); Brewer v. Ham, 876 F.2d 448, 452 (5th Cir. 1989); Overton v. City of Austin, 871 F.2d 529, 542 (5th Cir. 1989), Jones, J., concurring. This court concludes that in order to be viable

under the Thornburg v. Gingles rationale any such district must contain at least a voting age majority of the minority group. In the absence of sufficient votes to effectively compete, clearly it is not the existence of the multimember district that deprives the minority group of the opportunity to elect its preferred candidates.

In this case the defendants' expert, Dr. Weber, had accurate voter registration data available. In drawing subdistricts he attempted to form black voter registration majorities. Although it may not be appropriate to use registration figures in every vote dilution case, it strikes this court that, when such information is available, it provides valuable assistance in determining whether there is a violation of Section 2 in a judicial district, as

well as in fashioning a remedy which will actually work.

Relying upon Wells v. Edwards, 347 F.Supp. 453 (M.D. La. 1972), aff'd, 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973), plaintiffs, in both the liability trial and the remedy phase, have frequently ignored "one-man, one-vote" principles. As the Fifth Circuit pointed out in Chisom v. Edwards, 839 F.2d 1056, 1060 (5th Car. 1988), such equal representation principles do not apply per se to judicial elections, but Wells clearly has no application to claims of racial discrimination in judicial elections. This court certainly accepts the notion that there is no federal requirement that judicial districts must contain approximately equal numbers of people. Indeed, judicial districts are jurisdiction specific, not population

oriented. Many times the limits of a judicial district are historical and tied directly to a unit of local government. However, where one is drawing subdistricts within existing judicial districts, either for the purpose of determining violation under Section 2 or for remedy purposes, equitable considerations (and possibly constitutional questions) arise. A subdistrict which allows a much smaller number of people to elect one or more judges whose jurisdiction extends throughout the judicial district, including those who reside in the district but cannot vote for or against that judge or those judges, raises rather perplexing questions. In any event, this court concludes, as did Judge Barbour in Martin v. Allain, 658 F.Supp. 1183, 1198 (S.D. Miss. 1987) that equity demands

that all such subdistricts -- for whatever purpose created -- must contain substantially equal populations.

Plaintiffs as well as some of the other parties have implied that this court is free to create additional judgeships. The State Legislature followed that approach in the proposal which was rejected by Louisiana's voters. Clearly in determining whether a violation has been proven, the court is limited to existing circumstances. As Judge Jones pointed out in her concurring opinion in Overton v. City of Austin, 871 F.2d 529, 543 (5th Cir. 1989):

> "The district court assumed arguendo that it might order an expansion of the city council to accommodate single-member districts. This reasoning puts the cart before the horse, by authorizing a remedy for voter dilution before a violation of Section 2 has been found. Actionable vote dilution must be measured

> against the number of positions in the existing governmental body rather than some hypothetical model based upon whatever size is necessary to accomplish proportional representation . . . ."

As far as this court is concerned, the proper body to determine the optimum number of Louisiana judges is the Louisiana Legislature. Since the only additional judgeships created by the Legislature (excluding those enjoined by the three-judge court) were contingent upon voter approval of the entire package, this court will make no attempt to create additional judgeships for either violation or remedy purposes.

DISCUSSION OF EACH JUDICIAL DISTRICT IN WHICH A VIOLATION WAS FOUND

Each side had an expert who analyzed election results to estimate the number of black and white votes which were cast for various candidates. Both utilized

bivariate ecological regression analysis to obtain their estimates and their results are largely compatible with each other where the same elections are considered. Dr. Engstrom, the plaintiffs' expert, analyzed only elections in which a black candidate ran against one or more white candidates. His view was that in over ninety percent of the judicial elections he had reviewed, black voters strongly supported the black candidate. Dr. Engstrom felt that he did not receive much useful information from the results of an election in which black voters are given their choice of white candidates. Dr. Weber, for the defense, insisted that all elections should be included and he included every district court, family court and court of appeal election since 1978. The court's view is that some helpful information is provided by the

results in all elections but that the most significant results are those involving black candidates.

Plaintiffs have attempted to generalize Dr. Engstrom's findings in some specific judicial elections to judicial elections statewide. The court would agree that there is, for example, evidence of strong racial polarization in Louisiana statewide but that generalization does not substitute for the district specific evidence of vote dilution which must be presented before a Section 2 violation may be found in any district.

Both experts also analyzed the results of the 1987 Louisiana Secretary of State election, a state-wide election which included several black candidates, and the 1988 Louisiana presidential primary in which Rev. Jesse Jackson was a

candidate. While plaintiffs' expert, Dr. Engstrom, attributed more significance to those elections than did Dr. Weber, the court accepts them simply as general indications of voter behavior. For example, the evidence shows that the black Secretary of State candidates were almost unknown outside of the New Orleans area but almost everyone knows that Jesse Jackson is black. The results of those elections do, however, provide some useful information.

1. District Court and Family Court Districts

First Judicial District

Caddo Parish. Total population, 252,358. Black, 95,242 or 37%.

The parties have stipulated that at least one compact singlemember subdistrict can be drawn which would have a majority black population. Indeed, it

is undisputed that such a subdistrict would have a voting age majority. Hence, the first of the Thornburg requirements are met.

This district has nine district judges. Two black lawyers have been elected district judge in recent years in Caddo Parish. In 1974 Paul Lynch ran but lost to a white candidate. Neither expert included that election in his analysis. In 1978 Mr. Lynch ran again and was elected over a white candidate. The experts estimated that Lynch received more than ninety percent of the black votes cast and about 45% of the white votes. Judge Lynch died in office in 1982. In 1985 Carl Stewart was elected in the primary over two white candidates, with 50.7% of the total vote. The experts estimated that Stewart received nearly all the black votes and between

fourteen and nineteen percent of the white votes.

Evidence was presented of campaign appeals to racial prejudice by the successful white candidate in a 1982 election for Shreveport (which contains most of the people in Caddo Parish) City Court. Dr. Engstrom estimated that the black candidate received more than ninety-nine percent of the black votes in both the primary and general elections but only fourteen percent and 8.6 percent of the white votes.

The ten district court elections considered by Dr. Weber, together with the elections included by Dr. Engstrom provide a factual basis for concluding that black voters in Caddo Parish are politically cohesive and frequently support the same candidate in judicial elections. When the candidate is black,

black support is near unanimous. Despite the election victories by Judge Lynch and Judge Stewart, there is evidence to support the conclusion that the white majority usually does vote sufficiently as a bloc to prevent the minority's preferred candidate from winning.

The Zimmer factors discussed more fully in the original opinion support the conclusion that the totality of the circumstances demonstrate vote dilution and hence a Section 2 violation in this district.

Second Judicial District

Jackson, Claiborne and Bienville Parishes. Total population, 50,803. Black, 20,463 or 40.3%.

The minority population of this three-judge district is not grouped compactly, but instead is spread over all three parishes in the district. At the

first hearing, plaintiffs produced a district (as drawn by defendants, Ex. D-4) which was not at all compact (Dr. Weber counted 24 sides) and snaked through all three parishes. The proposed subdistrict produced a majority black population but not a majority black voter registration. At the remedy hearing, plaintiffs produced a very similar subdistrict with a 54.3% black voter registration which was fairly equal in population. Like the first proposal, the second is a gerrymander, making it impossible to draw two more (or even one more) reasonably compact subdistricts, and two of the principal towns in the district, Arcadia and Jonesboro, are split. The lack of compactness and the gerrymander are clearly shown on Ex. P-1, a copy of which is attached hereto. The

proposed majority black district is district 2.

Thornburg requires that there be a compact district in which the minority may be the majority. That threshold requirement has not been established and it is not necessary to discuss the other Thornburg requirements or the Zimmer factors. The court erred in finding a violation of Section 2 in this judicial district and that finding is hereby vacated and set aside.

Third Judicial District Lincoln and Union Parishes. Total population, 60,930. Black, 20,756 or 34.1%.

The subdistrict created here suffers some of the same problems as that created in the Second Judicial District. Plaintiffs have attempted to create two subdistricts in this two-judge district, one majority black. The subdistrict

submitted at the liability trial was not contiguous. The new subdistrict is more contiguous than the old but lacks compactness. It is simply not possible to draw a compact, population equal subdistrict having a majority black voter registration. Here again the first Thornburg threshold factor has not been established and the court erred in finding a violation of Section 2. That finding is hereby vacated and set aside.

Fourth Judicial District

Ouachita and Morehouse Parishes Total population, 174,044. Black, 54,562 or 31.3%.

The parties have stipulated that at least one single-member subdistrict can be drawn in this district which would have a majority black voter registration. This district elects seven judges. Since there were no district judge elections in

which blacks were candidates, Dr. Engstrom included 1984 elections for City Court judge in Bastrop and Monroe, the largest cities in Morehouse and Ouachita Parishes, respectively. He also analyzed a 1984 election for district attorney in the same district as the district court. There were black candidates in all three elections. Dr. Weber considered eight district court elections, one of which was a runoff of a primary. None of the elections Dr. Weber reviewed involved any black candidates.

It was Dr. Weber's opinion that the preferred candidate of minority voters won in seventy percent of the district court elections. The eight elections analyzed by Dr. Weber included three district court elections held at the same time as the city court and district attorney elections. In the district

attorney and city court elections, each black candidate received strong (well over a majority in each case) black support and almost no white support. Evidence was presented of overt appeals to racial prejudice by the white city court candidate in Monroe.

All the election results tend to show minority political cohesion in this district and racially polarized voting. These election results, together with the totality of the circumstances discussed in the original opinion lead the court to find that vote dilution and hence a Section 2 violation has been established in this district.

Sixth District

East Carroll, Madison and Tensas Parishes. Total population, 36,272. Black, 21,224 or 58.5%.

This two-judge district is majority black and the parties have stipulated that a single-member, compact, roughly equal in population black voter majority subdistrict may be drawn. Defendants' "Motion to Recall and Recast" does not challenge the court's finding of a Section 2 violation in this district. The court's interlocutory ruling will be reconsidered despite the fact that defendants have not specifically challenged it.

The only judicial election reviewed in this district was a 1984 race involving white only candidates considered by Dr. Weber. It was his opinion that the black "minority's" preferred candidate won. Dr. Engstrom also considered the results of the 1987 Louisiana Secretary of State election about which the court has already

commented and the 1988 Louisiana presidential primary about which the court has also already commented.

Plaintiffs bear the burden of proof as to both political cohesion and white bloc voting. The meager election results in this district are simply not sufficient to demonstrate the existence of the last two Thornburg threshold factors. The court erred in finding a violation of Section 2 in this district and that finding is hereby vacated and set aside.

Seventh Judicial District

Catahoula and Concordia Parishes. Total population, 35,268. Black, 11,231 or 31.8%.

The subdistrict originally proposed by plaintiffs in this two- judge district was neither compact nor contiguous At least three small areas were

noncontiguous either to the proposed district or to the remaining district. Moreover, the proposed subdistrict had a population deviation of more than twelve percent. On the remedy phase, plaintiffs submitted a revised subdistrict which apparently simply incorporates all black precincts, regardless of location. The revision has a population deviation of more than forty percent, splits the towns of Ferriday and Jonesville, and barely achieves a majority in voter registration. The court concludes that, after two tries, plaintiffs have failed to establish even the first prong of the Thornburg factors.

The court erred in finding a violation in this district and that finding is hereby vacated and set aside.

Ninth Judicial District

Rapides Parish. Total population, 135,282. Black, 36,308 or 26.8%.

The parties have also stipulated on this district as to the first of the Thornburg factors.

The expert for the defense, Dr. Weber, considered eight judicial elections since 1978 from this district. All except two were white only races and Dr. Engstrom considered the two with black candidates. Dr. Weber conceded that in this district black preferred candidates tended to lose, even in white only elections. Dr. Engstrom provided strong evidence of racial polarization in voting in this district and that there is political cohesion among black voters. The court concludes that plaintiffs have established all three of the Thornburg factors in this district. For the reasons originally set forth, the

totality of the circumstances demonstrates a Section 2 violation in this district.

Tenth Judicial District

Nachitoches Parish. Total population, 39,863. Black, 14,450, or 36.3%.

Having reviewed all the evidence from both hearings, the court concludes that a compact, contiguous single-member majority black district of roughly equal population cannot be created in this two judge district. About 8,800 of the total black population lives in the City of Nachitoches but the remaining black population is disbursed throughout the district. Plaintiffs' revised proposal on the remedy phase presents an affirmative gerrymander which has 52.5% black voter registration but splits the City of Nachitoches across several

subdistricts to no good purpose. It also presents a population deviation of nearly thirteen percent.

The court erred in finding a Section 2 violation in this district and that finding is hereby vacated and set aside.

Eleventh Judicial District

DeSoto and Sabine Parishes. Total population, 51,007. Black, 16,250 or 31.9%.

In this rural two-judge judicial district, the black population again is not grouped compactly. It is spread over both parishes. At the liability trial, plaintiffs proposed a subdistrict which included the City of Many as an isolated island, which contained a thirty-one percent population deviation and which contained forty sides. Its configuration made it impossible to create a second district with compactness. The revised

proposal submitted at the remedy hearing contained one subdistrict with a population of forty thousand and the other of ten thousand (a deviation of about 115%) and still produced a black voter majority of only 50.5%. The subdistrict is not compact, is a gerrymander and the population deviation is unacceptable. Dr. Weber had originally listed this judicial district as one in which the black population is neither large enough nor geographically compact enough to create a black majority single-member district. This court concludes that Dr. Weber was and is correct and that the initial Thornburg factor has not been proved.

The court erred in finding a Section 2 violation in this district and that finding is hereby vacated and set aside.

Fourteenth Judicial District

Calcasieu Parish. Total population, 167,223. Black, 35,284 or 21.7%.

There are eight judges in this district and the parties have stipulated that the first Thornburg factor may be met.

Dr. Weber testified that he reviewed six elections in this district. There were six different election days but there were actually eight separate judicial elections, one of which involved a black candidate in 1984. Dr. Engstrom considered only the one election involving the black candidate plus the statewide elections previously mentioned. Dr. Weber was of the opinion that the minority preferred candidate won 67% of the time. Dr. Engstrom was of the opinion that there was strong evidence of racial polarization in voting in the district, that the black minority was

politically cohesive and that white racial bloc voting usually prevented the black preferred candidate from winning.

Mr. Gray, the black lawyer who was the candidate, testified that he sought the support of white lawyers and public officials. He was the first black to run for a judicial office in the district and virtually no white lawyer or office holder would publicly endorse his campaign. He was told repeatedly that "Calcasieu Parish is not ready for a black judge," he had great difficulty raising funds, and he had great difficulty placing any yard signs in white areas (only two signs were placed in the entire parish). Mr. Gray campaigned almost exclusively in the white community; he received almost all of the black votes and very few white votes against two white opponents.

Plaintiffs have demonstrated political cohesion among black voters in this district as well as white bloc voting in frustration of minority preference.

The "Zimmer" factors originally discussed together with this evidence establish a Section 2 violation in this district.

Fifteenth Judicial District

Acadia, Lafayette and Vermillion Parishes Total population, 254,902. Black, 46,661 Or 18.3%.

The parties have stipulated on the first Thornburg factor in this eleven judge district (and it is only because of the high number of judges that such a subdistrict is possible).

Dr. Engstrom, for the plaintiffs, presented an analysis of what he called three elections involving black candidates versus white candidates. Dr.

Weber presented an analysis of six judicial elections in the district, including what he called two elections involving black candidates. They are the same elections; the witnesses just counted them differently. Dr. Weber was of the opinion that the black preferred candidate won only 33% of the time.

Mrs. Sylvia Cooks, the black lawyer who was the candidate in both (or all three) of those races, testified. She ran in 1983 for a newly created vacancy against one white male lawyer. She received over ninety percent of the black votes and a few white votes but lost. She was the first black person to run for judicial office in that district. Mrs. Cooks tried again in 1987 against three white male lawyers. Again she received solid black voter support; she made the run-off but lost in the general election.

Mrs. Cooks had fund raising problems in the white community similar to those of Mr. Gray in the Fourteenth District and similar problems in obtaining public white support. She also testified about the overt and covert racial appeals in both elections by candidates and the public. By all accounts, Mrs. Cooks ran a professional, well organized campaign, using a public relations specialist (who also testified), polls, television, etc. She spent large amounts of her own money. The court can say, without depreciating the qualifications of any of her opponents, that Mrs. Cooks was at least as well qualified professionally as any opponent in either race. As she put it, however, there was nothing that she could do about the color of her skin. There is no doubt that the white majority in the Fifteenth Judicial District voted against

her in both races because of the color of her skin and that the bloc vote prevented the black preferred candidates from winning.

It is beyond dispute that all three Thornburg factors have been established in this district and that evidence, together with the "Zimmer" factors discussed in the original opinion, support the Court's finding of a Section 2 violation in this district.

Sixteenth Judicial District

Iberia, St. Martin and St. Mary Parishes. Total population, 168,219. Black, 49,340 or 29.3%.

This district elects seven judges. Plaintiffs submitted two different proposals for subdistricts which defendants mapped. (Ex. D-9 and D-10) Each created a subdistrict which contained a barely majority black

population (52.5 and 51.7 percent, respectively) but there is no evidence that either proposed subdistrict would actually contain a majority black voting age or registered voter population. Both proposals contained or created other problems as well.

At the remedy hearing, plaintiffs submitted seven subdistricts, one of which achieved a black population of 58.1 percent and a black voter registration of 56.2 percent. The black majority district is not compact, although the populations of the districts are fairly even. The City of New Iberia is split among four subdistricts to no good purpose and most of the other six districts are irregularly shaped, as well.

The court concludes that plaintiffs have failed to demonstrate the first

Thornburg factor and it is not necessary to consider any other factor. The court erred in finding voting dilution in this district and that finding is hereby vacated and set aside.

Eighteenth Judicial District

Iberville, West Baton Rouge and Pointe Coupee Parishes. Total population, 75,290. Black, 33,041 or 43.9%.

With four judges, the parties have stipulated that the first Thornburg factor has been established.

Dr. Weber considered four judicial elections in this district, two of which involved the same black candidate. Dr. Engstrom considered only the races involving black candidates. Dr. Weber conceded that the candidate preferred by black voters lost in three of the four elections and that there is strong

evidence of racial polarization in voting.

(Although Dr. Weber's report, Ex. D-2a, Table 2 indicates that he considered only two elections in this district, Appendix A actually lists four separate judicial elections on three different dates, two of which involved the same black candidate.)

Despite the limited number of judicial elections in this district, the results of those elections, Dr. Weber's testimony, the results in other elections and Dr. Engstrom's testimony, convince the court that the finding of a Section 2 violation is correct.

Nineteenth Judicial District

East Baton Rouge Parish. Total population, 366,191. Black, 114,741 or 31.3%.

This district has thirteen judges and the parties have stipulated to the first Thornburg factor.

Dr. Engstrom, in his analysis, considered five judicial elections involving black candidates. He also considered two elections for the City Court of the City of Baton Rouge, which includes a significant portion of all residents of the Parish. Dr. Weber considered eleven district court elections, three of which involved black candidates. (Appendix A actually lists fourteen separate elections, counting primary and general elections.) In only one of the five elections was a black candidate elected -- in 1987 Judge Pitcher won. In the 1984 election, Rayford, a black candidate, received very strong black support but almost no white votes and lost. In two of the elections

there was little support for the black candidate among either black or white voters. In the fifth race, the black candidate had a majority but not nearly the solid black support that Rayford and Judge Pitcher received.

Judge Pitcher's election was unusual. It was held at a time when this litigation was pending in Baton Rouge, where the suit had received substantial news coverage. Pitcher was already a judge of the City Court and had the advantage of campaigning with the title "judge" before his name. It was also unusual in that Pitcher received substantial public support from white lawyers and community leaders. His margin of victory was only 52.7% although he received nearly all of the black votes in a race against a virtually unknown white lawyer.

This evidence, together with Dr. Engstrom's testimony and the Zimmer factors discussed previously support the court's finding that a violation has been established in this district.

The Family Court for the Parish of East Baton Rouge. The election district for this court of three judges is East Baton Rouge Parish. The parties have stipulated as to the first prong of Thornburg factors in this district. All that the court has said concerning the Nineteenth Judicial District applies equally to the Family Court election district. The evidence supports the court's finding of vote dilution, hence a Section 2 violation.

Twentieth Judicial District

East and West Feliciana Parishes. Total population, 31,201. Black 16,301 or 52.2%.

At the liability hearing, plaintiffs submitted a proposed subdistrict which was not compact, had a bare majority black population but less than a majority black voter registration. At the remedy phase, plaintiffs submitted a revised proposal which is more compact and is equal in population to the other district. It still does not achieve a majority black voter registration.

Plaintiffs' greatest problem in this rural, two-judge district is that they ignore the presence in West Feliciana Parish of the Louisiana State Penitentiary, the State's largest penal institution. At any given time, this prison houses about five thousand convicted felons -- none of whom have the right to vote. The prison is mostly black in population. To ignore a prison population in a large metropolitan area

is one matter but in a parish such as West Feliciana which has only 12,000 inhabitants, is quite another. Neither proposed subdistrict, because each contains so many disenfranchised residents, achieves a majority black voter registration.

The first Thornburg factor has not been established. The court erred in finding a Section 2 violation and that finding is hereby vacated and set aside.

Twenty-First Judicial District

Livingston, St. Helena and Tangipahoa Parishes. Total population, 149,331. Black, 33,306 or 22.3%.

There are six judges in the district and plaintiffs proposed six subdistricts at the remedy trial. Three of them, including the proposed majority black district, are not compact. Plaintiffs achieved a 52% majority black voter

registration but there is a 6.36% population deviation, the Town of Independence is split across two subdistricts and because of a poor history of black voter turn out, blacks are unlikely to outvote whites.

The court erred in finding a statutory violation in this district and that finding is hereby vacated and set aside.

Twenty-Third Judicial District

Ascension, Assumption and St. James Parishes. Total population, 93,647. Black, 28,413 or 30.3%.

The parties have stipulated that a compact, equal population majority black voter registration subdistrict can be created in this district. The defendants' "Motion to Recall and Recast" did not challenge the court's original finding of a Section 2 violation in this

district. The court nevertheless reviews the evidence.

There have been no judicial elections in this district in recent years. Thus, the only election information presented to the court was Dr. Engstrom's testimony and report of 1987 Secretary of State and the 1988 presidential primary. According to Dr. Engstrom, Rev. Jackson received the overwhelming majority of black votes and almost no white votes in this district. No evidence of any other election, mayor, school board, district attorney, sheriff, police jury or any of the host of political offices Louisiana elects was presented.

Any finding of a Section 2 violation here would simply be an assumption as to voter attitudes extrapolated from one presidential primary and the Secretary of

State election. The Fifth Circuit has cautioned the district courts about reading too much into "exogenous election results." Monroe v. City of Woodville, Miss., 881 F.2d 1327, 1329 (5th Cir. 1989), on petition for rehearing, 897 F.2d 763 (5th Cir. 1990); Westwego Citizens for Better Government v. City of Westwego, 872 F.2d 1201, 1208, n.8 (5th Cir. 1989). Although the presidential primary particularly demonstrates state-wide racial polarization in voting, that alone is not sufficient to prove vote dilution. A Presidential primary is not akin to a judicial election in this judicial district, particularly since Louisiana is a late-comer to presidential primaries. There is simply insufficient evidence to support a finding Of a Section 2 violation here.

The court erred in making such a finding and it is hereby vacated and set aside.

Twenty-Fourth Judicial District

Jefferson Parish. Total population, 454,592. Black, 63,001 or 13.9%.

This district has fifteen district judges and the parties have stipulated as to the first Thornburg factor.

A black lawyer has served as a district judge in Jefferson Parish. Lionel Collins was appointed to fill a vacancy and then in 1978 was the only candidate and was elected without opposition. He was reelected in 1984 without opposition and died in office in 1988. Such elections without opposition do not reveal very much about the electorate.

Dr. Weber included seven district judge elections in his analysis (although

he only refers to six in Table 2). He concluded that in 85% of the elections, the candidate favored by the minority voters won. He listed no elections involving black candidates. Dr. Engstrom included a 1987 election for Juvenile Court in Jefferson Parish in which a black candidate received 75% of the black votes but less than 5% of the white votes. This is a parish wide election with exactly the same district lines as the district court and, of course, is a judicial election. The court simply cannot accept Dr. Weber's theory that, given a choice of white candidates, black voters win 85% of the time. The presidential primary showed over 95% of the black voters for Rev. Jackson and about 5% of the white voters. The evidence of racial polarization is strong. Here it seems rather clear that

blacks cannot successfully field a candidate if the candidate has to run district wide and an 86% white majority will bloc vote against him. This is a district where the minority has not been able to field but one candidate. The minority in a smaller district could elect candidates of their choice. The evidence supports the court's finding of a Section 2 violation in this district.

Twenty-Sixth Judicial District

Bossier and Webster Parishes. Total population, 124,352. Black, 29,173 or 23.5%.

This district has four judges. (Act no. 174 of the 1989 Legislature adds a fifth judge but that legislation has apparently not yet been submitted for "preclearance" under Section 5 of the Voting Rights Act).

A review of all the evidence has convinced the court that no Section 2 violation has been proved in this district. The proposed subdistrict was nearly eleven percent below an equal population figure; the district was not compact; the district splits a voting precinct; and, finally, the district is not majority black -- black registered voters are only 43.3% of the total.

The court erred in concluding that a statutory violation has been established in this district and that finding is hereby vacated and set aside.

Twenty-seventh Judicial District

St. Landry Parish. Total population, 84,128. Black, 31,965 or 38.0%.

The parties have stipulated that a majority black registered voter district may be drawn in this four-judge district.

The only judicial election in this district in recent years (at least the only one presented to the court) was a 1982 election considered by Dr. Weber which involved only white candidates. It was Dr. Weber's opinion that the black preferred candidate did not win. The only other election results presented to the court were the aforementioned presidential primary and race for Secretary of State. There is simply not sufficient evidence. The Twenty seventh Judicial District may be an area where minority voters are politically cohesive but have been unable to field judicial candidates. Plaintiffs, however, bear the burden of proving these facts. Here, as in the Sixth and Twenty-third districts, plaintiffs have not presented sufficient evidence to establish the second and third Thornburg factors and

the court is unwilling to extrapolate conclusions from the sketchy election results presented.

The court erred in concluding that a Section 2 violation has been proved in this district and that finding is hereby vacated and set aside.

Twenty-Ninth Judicial District

St. Charles Parish. Total population, 37,259. Black, 9,499 or 25.4%.

Based on the testimony of Dr. Weber at the first hearing, the court concludes that it is not possible to draw a majority black subdistrict in this three-judge district which would meet the first Thornburg prong.

The court erred in finding a Section 2 violation in this district and that finding is hereby vacated and set aside.

Fortieth Judicial District

St. John the Baptist Parish. Total population, 31,924. Black, 12,175 or 38.1%.

The parties have stipulated that the first Thornburg factor is met in this two-judge district. Defendants' "Motion to Recall and Recast" does not challenge the court's finding of a Section 2 violation.

Dr. Weber considered four judicial elections, all involving only white candidates. It was his opinion that the candidate preferred by black voters won each election. Dr. Engstrom considered no judicial election results. He did consider the Secretary of State and presidential primary elections.

Dr. Weber's weighted regression analysis indicates that in all four elections black voters exhibited

political cohesion, as they did in the presidential primary. The court concludes that in this two-judge district, black voters have simply been unable to field a candidate. All Thornburg factors are present and that evidence, together with the Zimmer evidence discussed in the first opinion, supports the court's finding of a Section 2 violation.

Orleans Parish

Total population, 557,515. Black, 308,149 or 55.3%. As of January, 1988 blacks were 53.17% of the registered voters. The black voting age population has been and still is increasing and the black majority in registration is increasing. Blacks have been a majority of voters since March 31, 1985.

The parties have stipulated as to the first Thornburg prong. The Parish of

Orleans serves as an election district for numerous public offices, including civil and criminal district courts, juvenile court, one district of the Court of Appeal, Fourth Circuit, mayor, councilman-at-large, district attorney, civil sheriff, criminal sheriff, school board, civil clerk of court and criminal clerk of court. There are twelve civil district judges and ten criminal district judges. Orleans elects eight court of appeal judges. At present there are three black civil district court judges, no black criminal court judges and one black court of appeal judge. In the past, the late Ernest Morial was elected juvenile judge, after having been appointed to that office. Later he was elected to the court of appeal. He resigned his judicial position to run for mayor of New Orleans and was twice

elected. Also in the past, Judge Israel Augustine (now retired) was appointed criminal court judge and was later elected to that position over two white candidates, and was elected as court of appeal judge without opposition.

The current mayor of the city is black and has just been reelected to a second term. Blacks have been elected to many other offices in New Orleans where they are currently serving. Some blacks were elected before Orleans had a majority black population. They were elected with solid black support and some white "crossover" votes.

Dr. Engstrom, plaintiffs' expert, testified at the first hearing that Orleans Parish is now racially competitive:

> Q. You have said that a district can have polarized voting between blacks and whites, both; and yet

because of the outcome of elections caused by crossover votes by both whites and blacks, that the black vote is not diluted.
A. I have said that, yes.
Q. Isn't that true in Orleans Parish?
A. I have said that the Parish of Orleans is today a racially competitive election district.
Tr. vol 1, p.86

Further Dr. Engstrom testified:

Q. Will you kindly do it?
A. Well, I would say that a competitive district is an election in which both the black preferred and the white preferred candidates have reasonable opportunities to expect to be elected.
Q. And that is the state of Orleans Parish at this time?
A. That is the state of Orleans Parish today, yes, I believe so.
Tr. vol. 1, p. 104

Dr. Renwick, one of the defendants' experts, submitted a report, OTJA Ex. 12, which details the large number of black candidates who have been elected to office, including judicial office, in Orleans Parish. These is no question that black voters are politically active

and organized. They can be politically cohesive but they do not always vote as a racial bloc. There is cross over voting among both black and white voters, although less among white voters.

Plaintiffs cannot dispute the facts which past election results and voter registration figures establish and they do not attempt to do so. They argue instead that the court should impose remedial action because of the effects of "present and past dilution of black voting strength."[2/] This court finds

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[2/] More particularly, plaintiffs argue that the court correctly found in its opinion on liability that there is a current dilution of black voting strength in Orleans Parish. Plaintiffs contend that the fact that Orleans Parish has a majority black population is not dispositive under the case law and because of state-sanctioned historical discrimination and resulting socioeconomic burdens, blacks are a minority of those voting in at large judicial elections. Plaintiffs further

(Footnote continued on following page)

that, although there is still significant racial polarization in voting in Orleans Parish, there is no longer dilution of black voting strength. Plaintiffs contend that drawing smaller, blacker subdistricts would decrease the cost of

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[2/](Footnote continued from preceding page) contend that black electoral success in non-judicial offices should not defeat an otherwise meritorious Section 2 claim. Alternatively, plaintiffs argue that even if black voting strength is not presently diluted, the "power of incumbency" of white judges (elected when at-large elections diluted black voting strength) perpetuates the effects of prior dilution and the system must be changed under Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139, 147 (5th Cir. 1971)

In view of Dr. Engstrom's testimony at the liability phase and again at the remedy phase that there is presently no dilution of black votes in Orleans Parish, plaintiffs simply have not established a Section 2 claim under Gingles. Plaintiffs' reliance upon Kirksey which deals with perpetuation of intentional and purposeful discriminatory denial of access in violation of the Constitution is not persuasive here. Nor is it clear from the evidence presented that dilution will be perpetuated due to the incumbency of white judges.

elections and make it easier to elect candidates preferred by black voters to judicial office. That would no doubt be the result of taking plaintiffs' suggestion.

The court's response is that Section 2 of the Voting Rights Act specifically does not guarantee proportional representation. The evidence shows that Orleans Parish is at present a level playing field for voters of both races. That is supposed to be the aim of the Voting Rights Act and of this court. Louisiana may draw its judicial election districts in any fashion it chooses so long as the use of the district does not dilute minority voting strength.

The court erred in finding a Section 2 violation in Orleans Parish and that finding is hereby vacated and set aside.

What has been said here applies to all judicial elections for which Orleans Parish is the district.

2. Courts of Appeal

This court's discussion of the Thornburg factors as related to the courts of appeal was even more sparse than the discussion relating to the district courts. As we have already noted, Thornburg requires district courts to make factual and district specific findings in vote dilution cases. That deficiency will be corrected by an individual examination of each district in which the court has made a finding of a Section 2 violation.

Courts of Appeal, Circuit-wide

The court found a Section 2 violation, "using a circuitwide analysis [in] all five of the existing circuit courts of appeal." 725 F. Supp. at 304.

The primary underpinning for that finding was the testimony of Mr. Floyd (Tr. Vol. 3, p. 14-17) that at least one compact, contiguous majority black district could be drawn in each circuit by ignoring existing district lines. As the Fifth Circuit subsequently held in Overton v. City of Austin, supra, that approach "puts the cart before the horse." 871 F.2d at 543. The determination of vote dilution begins with examining the existing election district and the existing number of positions. Whether a court ought to consider changes in either, as a part of the remedy should a violation be found, is no part of determining whether there is vote dilution, for if there is vote dilution it is the existing district which must be its cause in order for there to be a Section 2 violation.

It is clear that the court erred in finding that even the first of the Thornburg threshold requirements could be satisfied under the circuitwide analysis employed by Mr. Floyd. The court also erred in finding circuitwide statutory violations and that finding is hereby vacated and set aside.

First Circuit

Each of the three districts within this district elects four judges.

District 2

East Baton Rouge Parish. The parties stipulated to the drawing of a district here as they did for the Nineteenth Judicial District. The findings of the court as to the district court are equally applicable to the court of appeal district. Dr. Weber's inclusion of three elections in this district involving all white candidates

does not alter the finding of vote dilution.

District 3

East and West Feliciana, Livingston, St. Helena, St. Tammany, Tangipahoa and Washington Parishes. Total population, 335,608. Black, 76,776 or 22.9%.

Plaintiffs were unable to draw a compact, majority black district within this district. The district proposed (depicted graphically upon Ex. D-15) is not compact and has a black voter registration of only 43%. The first Thornburg requirement has not been met.

The court erred in finding a violation of the statute in this district and that finding is hereby vacated and set aside.

Second Circuit

Each of the three districts elects two judges and one judge is elected at-

large. (A second at-large judgeship was added by Act No. 801 of 1987 but that legislation has not yet been "precleared" under Section 5 of the Voting Rights Act, hence it cannot be put into effect.)

Plaintiffs were unable to create subdistricts in any district of this court that actually had a majority black voter registration without allocating one of the at-large judges. In District 2 plaintiffs reallocated the at-large judgeship but still could produce only a 47.6% black voter registration. Under Overton, supra, of course, one may not add positions in deciding the question of violation.

The court erred in finding Section 2 violations in districts 1, 2 and 3 of the Second Circuit and those findings are hereby vacated and set aside.

Third Circuit

Each of the three districts in this circuit elects two judges and three are elected at-large. (Act No. 801 of 1987 added an additional judgeship in each district but, as noted, the legislation has not been "precleared.")

In this circuit plaintiffs were unable to propose a compact, majority black subdistrict in any district. In order to try to create such subdistricts, they added the Act 801 judgeships and reallotted the at-large judgeships, one to each district. Even then it is not at all clear that the subdistricts would contain majority black voter registrations. In any event, plaintiffs approach is contrary to the teaching of Overton, supra. The court erred in finding violations of the statute in districts 1, 2 and 3 of the Third Circuit

and those findings are hereby vacated and set aside.

Fourth Circuit

District 1 (Orleans Parish) elects eight judges and each of the other two districts, (Plaquemines and St. Bernard Parishes) elects one. In addition, two judges are elected at-large.

Plaquemines Parish, total population, 26,049. Black, 5,540 or 21.3%

St. Bernard Parish, total population, 64,097. Black, 2,411 or 3.8%.

At-Large

The only evidence offered was Mr. Floyd's testimony that it is possible to draw majority black districts. It is quite apparent that a large number of Orleans precincts would have to be utilized for this purpose and the court

has now held that there is no vote dilution there. Accepting Mr. Floyd's testimony, there is still no evidence as to the second and third Thornburg requirements. The evidence is simply insufficient to establish vote dilution. The court erred in finding vote dilution in the at-large elections in this circuit and that finding is hereby vacated and set aside.

Fifth Circuit

This circuit elects six judges from district one and one from each of the other two.

District 1

Jefferson Parish. The court found vote dilution in the Twenty-fourth Judicial District, which is also Jefferson Parish, based in part upon the stipulation of the parties that if the

Twenty-fourth Judicial District were to be:

> ". . . subdivided into single-member subdistricts -- with the number of single-member subdistricts equalling the number of judges in the original district, and with the subdistricts being of roughly equal population when compared to the other subdistricts within the original district -- the black population . . . is sufficiently large and geographically compact to constitute a majority in at least one of the single-member subdistricts." (Stipulation No. 17).

There is no such stipulation for the Court of Appeal District, relating to the first Thornburg threshold factor. The finding at the district court level does not automatically dictate such a finding for the court of appeal district. Plaintiffs were unable to draw a compact, contiguous district using the authorized number of positions (six) which was majority black in population or voter registration and thus failed to establish

the first Thornburg factor. The court erred in finding a Section 2 violation in district 1 of this circuit and that finding is hereby vacated and set aside.

REMEDY

Having found Section 2 violations in some judicial districts, the court must now consider the appropriate remedy.

1. Legislative Plan

Initially, the court considers plaintiffs' argument that the court accept the "package" of bills, which the Legislature submitted to the voters as a constitutional amendment, as a "legislative plan" to which the court must defer. Plaintiffs insist that, because the "package" was designed by the Legislature, the court accept it as a legislative proposal to the court. As the defendants point out, the "plan" was rejected by the voters. As the court has

pointed out, that "plan" was not submitted to the court. The Legislature has submitted nothing to the court. Much of the proposal submitted to the people did not, under Louisiana law, require amending the state constitution, yet the Legislature chose to base the entire package on a vote of the people. No contingency plan was prepared or submitted. The Legislature had no restrictions upon it as to what it might propose to the court. The court has no information indicating a legislative preference as to remedy because none has been submitted. Accordingly, the court concludes that no proposal before the court is entitled to preference over any other proposal.

2. Systemic Remedy

Throughout these proceedings, this court has sought to avoid creating sub

judicial districts in "guilty" districts, insisting that, if the election system employed by the state produced violations of Section 2 of the Voting Rights Act, the proper remedy would be to change the system, not tinker with a few judicial districts. As noted earlier, that view has found no support from any party to the litigation. All plaintiffs, all defendants and all intervenors have specifically declined to embrace the court's notion.

The Louisiana Organization For Judicial Excellence, as amicus curiae, however, in an eloquent brief, has urged the court to seize the "unique and rare opportunity to serve the people of Louisiana by establishing for the long term a judicial system designed ... 'to establish justice for all'." The Louisiana Organization For Judicial

Excellence suggests that the court devise and order implemented a system of merit selection involving appointment and retention election for judges similar in many respects to the so-called "Missouri Plan" which is presently used in thirty-three states plus the District of Columbia and Puerto Rico at some or all levels of the judiciary. The Louisiana Organization For Judicial Excellence insists that such a merit system would not only improve the quality of the state judiciary but also would totally eliminate any possibility of Section 2 violations. Alternatively, LOJE suggests that if the court is restricted to providing remedies only in "guilty" judicial districts, then merit selection can and should be employed in those districts, thus encouraging the

Legislature to extend the process statewide.

The court is convinced that it is not free to write upon a clean slate; neither is it proper to anticipate and make provision for violations which will probably arise in the future, given the system employed by the state.

It is well settled that a federal district court, in fashioning a remedy for voting rights violations should not "intrude upon state policy any more than necessary." **White v. Weiser**, 412 U.S. 783, 795, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973) (reapportionment plan). Federal courts should follow policies expressed in state statutory and constitutional provisions wherever adherence to state policy would not detract from federal constitutional requirements. **Id.** This same rule of deference applies in Section

2 cases. **McGhee v. Granville County, N.C.**, 860 F.2d 110 (4th Cir. 1988)

As was noted by Judge Barbour in considering the Mississippi judicial election system, a federal court in fashioning a remedy in a judicial election case should conform to state policies as set forth in "existing state election and political laws" as much as possible. **Martin v. Mabus**, 700 F.Supp. 327, 330 (S.D. Miss. 1988). All of the parties to this Louisiana litigation appear to agree that the basic goal of judicial deference to state policies is applicable. Not surprisingly, however, the parties disagree on what constitutes a state policy and which policy should be furthered over others.

There are essentially three policies expressed in the Louisiana Constitution of 1974 which have been identified by the

parties. Plaintiffs contend that Article 5, Section 22(A), which provides that "all judges shall be elected" with certain minor exceptions, should be paramount.

The state defendants point to Article 5, Sections 9 and 14 as setting forth a policy against subdistricting judicial districts. Those section provides:

> Section 9: Each circuit shall be divided into at least three districts, and at least one judge shall be elected from each. The circuits and districts and the number of judges as elected in each circuit on the effective date of this constitution are retained, subject to change by law enacted by two-thirds of the elected members of each house of the legislature.
>
> Section 14: The state shall be divided into judicial districts, each composed of at least one parish and served

by at least one district judge.

The Orleans Trial Judges have suggested that "Article 1 Section 10 of the state constitution expresses a more paramount state policy" of protecting the right to vote.

The Louisiana Revised Statutes contain numerous sections relating to the courts of appeal, the district courts and the Family Court for the Parish of East Baton Rouge. Section 312 of Title 13 of the Louisiana Revised Statutes establishes the five court of appeal circuits and subdivides the state by parishes; it further subdivides each circuit into districts composed of at least one parish. (The only parish to be subdivided is St. John the Baptist Parish.) Sections 312.1, 312.2 and 312.3 establish the number of judges for each

circuit and sets forth the number of judges which are to be elected from each election district or at-large by the "qualified electors" of that circuit. Section 321 creates divisions of the districts of the courts of appeal for the "purpose of nomination and election only." Candidates for nomination and election to any court of appeal must "at the time of filing his declaration as a candidate ... designate only one division of the district ... for which he is a candidate."

Section 477 establishes forty judicial districts excluding the Parish of Orleans. Each district is composed of one or more parishes. Section 582 provides for "separate and distinct divisions of the various district courts having two or more elected or appointed judges, for the purposes of nomination

and election." Under Section 584, each candidate must designate the division for which he is a candidate. Under Section 585, the nomination and election of candidates for district judgeships is to be held and conducted in accordance with the primary and general election laws of the state. Sections 1136, 1335, 1346 and 1403 set forth the number of judges for Orleans Civil District and Criminal District Courts and the Family Court for the Parish of East Baton Rouge.

Title 18, the Election Code, also contains numerous provisions relating to election of judicial officers. Sections 511 and 512 are the only pertinent provisions and they deal with the election of candidates in primary and general elections: both sections require a majority vote.

This court concludes that Louisiana's constitutional and statutory policies demonstrate a strong preference for popular election of judicial officers by majority vote. That conclusion precludes the use of the gubernatorial appointment and retention election system advocated by the Louisiana Organization for Judicial Excellence. While a retention election ("Shall Judge Doe be retained in office?") is technically an election, it is an election preceded by gubernatorial appointment and hence not a popular election in the Louisiana sense of the term.

Federal courts in fashioning remedies for violations of federal law must always be aware that the court has authority only to remedy the specific federal violation. The federal court is not free to impose its own notion of

whether a better system than that employed by the state could be devised. Federal authority becomes involved only because of a federal violation and, while the court has broad equitable authority to remedy the federal violation, that authority ends when the remedy is devised. Thus, the remedy to be fashioned in this case must: (1) be district specific, that is, the remedy may be imposed only in those specific districts where violations have been proven and (2) follow state policies except to the limited extent necessary to remedy the federal violations. **White v. Weiser**, 412 U.S. 783, 795, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973); **Martin v. Mabus**, 700 Fed.Supp. 327 (S.D. Miss. 1988)

This court has received a plethora of proposals on remedy. Plaintiffs have proposed subdistricts in judicial

districts which are drawn so as to maximize minority voting strength. Creation of such subdistricts obviously generates other problems, such as compactness, equality of population, need for future modification because of additional judgeships or population changes and the potential or perceived potential for small election districts leading to "home town" justice, to name a few.

In an effort to avoid the problems inherent in any subdistrict scheme involving judicial elections, the Louisiana District Judges Association and the Governor propose a simple solution -- plurality voting in judicial elections by division -- at both district and court of appeal levels. The advantages cited by the advocates of plurality voting are many: no need to draw or redraw compact,

contiguous, equal population subdistricts; it retains Louisiana's strong preference for popular election of judges; no problems are caused by adding additional judgeships; there is no concern about future violations -- as minority voting strength increases in any particular district so will go the elections. Plaintiffs assert that the proposal has at least one significant disadvantage; it has not been demonstrated that plurality voting will actually provide a remedy for minority vote dilution.

The temptation is great to embrace a seemingly simple, almost painless solution as the remedy in this case. The court has carefully considered the evidence for and against the plurality voting proposal. Ultimately, however, the court must conclude that elimination

of the majority vote requirements in judicial elections will not actually remedy the Section 2 violations which have been established in this case. The court is mandated to fashion a remedy which will actually work and there is not sufficient evidence to sustain a conclusion that plurality voting will actually eliminate minority vote dilution. Dr. Weber has speculated on a number of possible scenarios in which black voters could win plurality elections. The problem with that approach is that it is, indeed, speculation. As plaintiffs have pointed out, plurality voting, by its very nature, requires more than two candidates and the overwhelming number of Louisiana judicial elections involve only two candidates. Plurality voting has every advantage except that of actually

providing a remedy. For that reason the court must reject it.

The Governor has presented what might be best described as a smorgasbord of possible remedies. They include a plan for multi-member subdistricts plus retention elections, a series of counter-subdistricts to those proposed by plaintiffs and a mixture of several different approaches.

As an alternative to the drawing of subdistricts, about which this court has voiced reservations from the beginning of the case, plaintiffs have proposed the institution of a system of limited voting. This proposal is offered as a counter to the other side's suggestion of plurality voting. This system was described by Dr. Engstrom and essentially would limit the number of votes to be cast by each elector in multimember

districts to some number less than the number of positions to be filled. The theory is that a minority in such an election can overcome the effects of majority vote dilution by putting their strength behind a particular candidate. The limited number of votes make it less likely that the majority will be able to determine the winners of all positions, thus eliminating the "winner-take-all" effect. This proposal would require elimination of Louisiana's majority vote requirement and would require all candidates to run, without designation by division, in a pool. Elections would be required at the conclusion of every term since all candidates would qualify for the same office and the top vote getters would fill the available positions.

This court declines to accept limited voting for several reasons.

First, it makes more changes in Louisiana's chosen election system than required. At present, a competent judge frequently has no opposition for his re-election and no election is held, rewarding the judge for his service and saving the cost of an election. Under limited voting, an election would be necessary unless, for example, there were four positions to be filled and only four people qualified. The majority vote requirement has already been mentioned. Second, this court finds it difficult to comprehend how we expand access to the ballot box by limiting the number of votes each elector may cast.

The court reluctantly concludes that the subdistrict approach suggested by plaintiffs, with all of its attendant problems, represents the only proposal which will actually remedy the violations

of Section 2 (short of devising an entirely different system). Election subdistricts will be drawn in those judicial districts where violations have been found. State residence requirements shall be maintained in the judicial district but there shall be no residence requirement as to any election subdistrict. All other state election requirements shall be maintained.

Dr. Weber testified that in proposing alternate subdistricts to those opposed by plaintiffs, he relied upon eight criteria. As the court understands them, they are:

(1) All subdistricts must be compact;

(2) All subdistricts must be contiguous;

(3) Parish and municipal boundaries should be maintained;

(4) Current parish precinct lines should be followed;

(5) Each subdistrict must be drawn using the existing number of judgeships;

(6) Deviation in population across subdistricts must be kept to a minimum;

(7) Gerrymandering to dilute minority voting strength must be avoided;

(8) "Packing" or gerrymandering to concentrate minority voting strength in an attempt to achieve proportional representation must be avoided.

These factors are appropriate and will be applied in determining subdistricts to be drawn in this case.

The court has reviewed each subdistrict proposed by the parties in the eleven districts in which violations are found. As noted elsewhere, many subdistricts drawn by plaintiffs ignore the factor of equal population. Many of

their subdistricts are not compact or contiguous and some of them do not comply with other criteria. Some of those proposed by Dr. Weber also present problems. The court is prepared, if necessary, to draw the districts itself; however, it would be of great benefit to the court if the parties could stipulate on those factors.

The court requests the parties to confer with each other with the aim of entering a stipulation: (a) as to the configuration of subdistricts, (b) as to the number of judges to be elected in each subdistrict and (c) as to the specific divisions which shall be allotted to each subdistrict for election purposes.

If such a stipulation is entered, it is understood that it will be done with full reservations of rights as to all

parties and the stipulation shall not preclude any party from appealing the court's findings as to any judicial district.

For the foregoing reasons, there will be judgment in favor of plaintiffs and against defendants making the injunction previously issued herein permanent as to the first, fourth, ninth, fourteenth, fifteenth, eighteenth, nineteenth, twenty-fourth and fortieth judicial districts and as to the Family Court for the Parish of East Baton Rouge and as to the Court of Appeal First Circuit, District 2. The injunction will be vacated as to all other judicial districts.

Baton Rouge, Louisiana, June 12, 1990.

/s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT
STATE OF LOUISIANA

JANICE G. CLARK, ET AL. — CIVIL ACTION NO. 86-435 SEC. A

Plaintiffs,

versus

CHARLES "BUDDY" ROEMER, ET AL.
CHIEF JUDGE JOHN V. PARKER

Defendants.

ORDER FOR FINAL JUDGMENT

[Entered October 19, 1990]

Defendants and Intervenors, the Louisiana District Judges Association ("LDJA") have moved for an Order pursuant to Rule 54(b), for the dismissal of the claim asserted by the plaintiffs that "the at-large election scheme of electing Appeal, Family, and District Court judges in the State of Louisiana unlawfully dilutes black voting strength and results in the denial of plaintiffs' opportunity

to participate equally in the electoral process and to elect judges of their choice, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973", [Plaintiffs' Fourth Supplemental and Amended Complaint, prayer, paragraph (b)], pursuant to the decision entitled League of United Latin American Citizens, Council No. 4434, et al. v. William P. Clements, etc. et al., 90-8014 (5th Cir. en banc, September 28, 1990) ("LULAC"); and the Court has taken into consideration that there has been no judgment heretofore herein rendered and also has Recalled and Recast its Findings of Fact and Conclusions of Law Liability Phase as entered on August 15, 1988, 725 F. Supp. 285 (M.D. La. 1988) and Recalled and Recast its Findings of Fact and Conclusions of Law - Remedy Phase as entered June 13, 1990, so as to dismiss

the claim asserted by the plaintiffs that "the at-large election scheme of electing Appeal, Family and District Court judges in the State of Louisiana unlawfully dilutes black voting strength and results in the denial of plaintiffs' opportunity to participate equally in the electoral process and to elect judges of their choice, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973", [Plaintiffs' Fourth Supplemental and Amended Complaint, prayer, paragraph (b)], pursuant to the LULAC decision, and the Court is satisfied that the movers are entitled to the relief requested.

IT IS ORDERED that defendants Rule 54(b) Motion be and the same is hereby granted, and that the Clerk of this Court enter a final Judgment upon the Order herein dismissing plaintiffs' claim that

"the at-large election scheme of electing Appeal, Family, and District Court judges in the State of Louisiana unlawfully dilutes black voting strength and results in the denial of plaintiffs' opportunity to participate equally in the electoral process and to elect judges of their choice, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973"; [Plaintiffs' Fourth Supplemental and Amended Complaint, prayer, paragraph (b),] pursuant to the LULAC decision, and the undersigned expressly determines that there is no just reason for delay in the entry of a final Judgment of this Order.

Dated: October 19, 1990.

/s/ John V. Parker
Honorable John V. Parker
Chief Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT
STATE OF LOUISIANA

JANICE G. CLARK, ET AL

VERSUS CIVIL ACTION

CHARLES "BUDDY" ROEMER, ET AL NO. 86-435-A

RULE 54(b) JUDGMENT

The court having granted defendants' motion for order for final judgment,

IT IS ORDERED ADJUDGED AND DECREED that pursuant to Rule 54(b) of the Fed.R.Civ.P., plaintiffs' claim that "the at-large election scheme of electing Appeal, Family and District Court judges in the State of Louisiana unlawfully dilutes black voting strength and results in the denial of plaintiffs' opportunity to participate equally in the electoral process and to elect judges of their

choice, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973", is hereby DISMISSED.

Baton Rouge, Louisiana, October 19, 1990.

/s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

JANICE CLARK, ET AL

VERSUS

CHARLES "BUDDY" ROEMER, ET AL

CIVIL ACTION

NO. 86-435-A

WRITTEN REASONS ON MOTION TO DISSOLVE INJUNCTION

REVISED
NOVEMBER 2, 1990

On September 28, 1990, the United States Court of Appeals for the Fifth Circuit rendered an en banc decision in League of United Latin American Citizens v. Clements, No. 90-8014, a case involving a challenge to at-large election of Texas trial judges. The majority opinion held that the 1982 amendment to Section 2 of the Voting

Rights Act (42 USC §1973) providing for a "results" test method of proving vote dilution claims does not apply to judicial elections. The Fifth Circuit's prior decision in Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988), a case involving a challenge to at-large election of justices of the Supreme Court of Louisiana, was specifically overruled by name.

This court, as it was bound to do,[1] followed Chisom and found that plaintiffs had proven Section 2 violations using the "results" test in elections in some Louisiana court of appeal and district

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[1] "[O]nce an appellate court has decided an issue in a particular case both the District Court and the Court of Appeals should be bound by that decision in any subsequent proceeding in the same case . . . . unless . . . controlling authority has since made a contrary decision of law applicable to the issue." (citations omitted); **White v. Murtha**, 377 F.2d 428, 431-32 (5th Cir. 1967).

judgeships and accordingly enjoined judicial elections in certain district and appellate courts in this State. See Clark v. Edwards, 725 F.Supp. 285 (M.D. La. 1988). The court then called upon the Louisiana Legislature to fashion a remedy for the violations of federal law. Approximately one year was consumed in efforts by the Louisiana authorities which ultimately proved futile when the people of the state voted against a proposed amendment to the Louisiana Constitution.

Plaintiffs thereupon moved for a hearing upon a judicial remedy and a full-blown trial was held. The court issued additional findings of fact and conclusions of law but withheld final judgment pending a decision by the Court of Appeals in LULAC.

The system of at-large districts utilized by Louisiana in judicial elections is almost identical to that of Texas which LULAC considered. Although LULAC deals only with trial (district) judges, its reasoning clearly extends to court of appeal judges as well. LULAC, which this court is now bound to follow, **White v. Murtha, supra,** unquestionably vitiates the prior rulings of this court based upon the Fifth Circuit's earlier teaching of Chisom. Accordingly, the injunction must be vacated as to all judicial elections, courts of appeal as well as district courts.

Coincidentally, the LULAC decision was released on September 28, 1990 while the three-judge court was conducting a hearing in this matter relative to alleged violations of Section 5 of the Voting Rights Act (42 USC §1973c) in

certain judicial districts.[2/] After the three-judge court recessed, this court heard oral argument as to the effect that LULAC had on plaintiffs' Section 2 claims. The court indicated that it would vacate the injunction as to all districts because under the new teaching of LULAC, there could be no federal violation in any district. The elections having already been delayed by court order, the court was chiefly concerned that the elections should go forward as fairly as rapidly as possible and with the least expense to the State. Consequently, the court further indicated that qualification would commence on

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[2/] Section 5 provides that in some states and localities, no change in election practices may be enforced without a declaratory judgment from the United States District Court for the District of Columbia or "preclearance" by the United States Attorney General.

Wednesday, October 3rd and continue through Friday, October 5,[3/] and the elections would be conducted on November 6th, which is the next regularly scheduled election day, with runoff elections, if needed, on December 8.

On October 1, 1990, the Governor of Louisiana and the Louisiana District Judges Association followed up with a written motion "to dissolve injunction." This matter was heard on an expedited basis on October 2, 1990. Counsel for plaintiffs raised questions relating to the jurisdiction of this court to order the elections to go forward and the fairness of setting qualification dates with relatively little notice to

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[3/] The attorney representing the Secretary of State indicated that if the elections were to be held on November 6th qualification would have to be held no later than October 3rd through 5th.

potential judicial candidates. After hearing extensive arguments and some testimony, the court granted the motion to dissolve the injunction as to all trial and appellate court districts which had been found in violation of Section 2 and the court entered an order to that effect. The court now supplements its oral reasons.

As the court initially understood plaintiff's jurisdictional argument, plaintiffs contended that the court had no authority to act beyond vacating the injunction. However, as the hearing progressed, plaintiffs' jurisdictional challenge was either refined or merged with the secondary argument of fairness. Essentially, plaintiffs argued that the court should (or could) not set qualification and election dates on a time schedule that was shorter than that

provided by state election laws. Plaintiffs presented testimony relating to the obvious hardships placed on potential candidates when faced with only a few days notice of the qualification period. There is little doubt that some persons attempting to enter the political arena upon short notice do face disadvantages, financially and otherwise.

Defendants argued that as a matter of equity the court not only had the power to vacate the injunction but was authorized to make such orders as may be necessary to return the parties to their original positions or as closely thereto as possible. The Louisiana District Judges Association presented testimony to establish that incumbents and others already in the political arena would be ready to qualify for judicial offices if qualifying opened on October 3rd.

The year 1990 is the scheduled election year for virtually all Louisiana district, family court and court of appeal judges. The primary election date called for by Louisiana law is October 6. The general election fixed by state law is November 6. Most terms of office expire December 31, 1990. Defendants argued that if the elections were not held prior to January 1, 1991, the state judiciary would likely be further disrupted by lawsuits challenging authority to sit past the expiration of the term of office. It also became apparent that in the absence of an order of this court, the elections could not be held until the gubernatorial primary of October 1991.

The court agrees with defendants that it has the authority,[4/] in vacating the injunction, to return the parties as closely as possible to the positions they would have maintained had the injunction not issued. It is clear, however, that there is no ideal solution and the court must balance the equities involved.

Although notice of the qualification period is short, it is not unprecedented in Louisiana. In Jones v. State of Louisiana, 336 So.2d 59 (La. App. 1st Cir. 1976) writ denied 336 So.2d 515, the court considered a qualification period established in an act of the Legislature creating additional judgeships. The act became effective upon signature of the governor on June 30, 1976. The

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4/ One source of such authority is the all writs statute, 28 USC §1651.

qualification period was July 2, 3, 4 and 5. The court approved the short notice.

The court finds that it is in the public interest that the elections proceed on November 6th based upon cost and time considerations. Significantly, all members of the electorate are not potential candidates. Only lawyers possessing the state specified qualifications may become candidates and without doubt lawyers and judges who are interested in becoming candidates have followed these proceedings closely and will be aware of the qualification period and election date.

Additionally, it is important that there be the least disruption of judicial workload as possible. Further delay could create uncertainties as to judicial dockets and possibly result in legal challenges to individual decisions made

after January 1st. While the court recognizes that some potential candidates for these offices may be disadvantaged by the short notice provided, the court finds that their interests must yield to the more important public interest of legitimacy and stability of the state judiciary. Doubt as to the right to hold office of state judges must be avoided if at all possible.

Baton Rouge, Louisiana, November 2, 1990.

/s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

No. 90-898

Supreme Court, U.S.
FILED
DEC 28 1990
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In The

Supreme Court of the United States

October Term, 1990

JANICE G. CLARK, ORSCINI L. BEARD, EDDIE G. CRAWFORD, NORBERT C. RAYFORD, VOTER INFORMATION PROJECT, INC., LOUIS SCOTT, SYLVIA COOK, CONNIE SADLER, TOM NELSON AND ALBERT RICHARD,

Petitioners,

versus

CHARLES "BUDDY" ROEMER, GOVERNOR OF LOUISIANA; WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA; FOX McKEITHEN, SECRETARY OF STATE OF THE STATE OF LOUISIANA, IN THEIR OFFICIAL CAPACITIES AS REPRESENTATIVES OF THE STATE OF LOUISIANA,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Did Congress intend the word "representatives" as used in the Voting Rights Act of 1965, § 2(b) as amended, 42 U.S.C. § 1973, to include judges who are selected by a state judicial electoral process?

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STATEMENT OF THE CASE[1]

Petitioners brought this suit in the United States District Court for the Middle District of Louisiana as a class action pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The class consisted of all black voters in the State of Louisiana. The suit challenged the at-large voting system for the election of District, Family Court and Courts of Appeal judges as being in violation of the 1965 Voting Rights Act, as amended, because, allegedly, the use of an at-large system results in a denial or abridgment of the right to vote of petitioners and all those similarly situated on account of race and color. Petitioners further asserted that several Louisiana statutory provisions had not been precleared by the Justice Department in contravention of the 1965 Voting Rights Act. Jurisdiction was based on 28 U.S.C. §§ 1331, 1343(3), (4) and 42 U.S.C. §§ 1973, 1973(c) and 1973(f).

The action sought declaratory and injunctive relief, 28 U.S.C. §§ 2201 and 2202. The cause of action was asserted to have arisen under Sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 and 1973(b) as amended in 1982, 42 U.S.C. §§ 1983 and 1988 as well as the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution.

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[1] Petitioners have presented the following Question:

> Does Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, apply to elections for state court judges?

Respondents present the following Question:

> Did Congress intend the word "representatives" as used in the Voting Rights Act of 1965, § 2(b) as amended, 42 U.S.C. § 1973, to include judges who are selected by a state judicial electoral process?

Respondents have never taken the position that Section 2 of the Voting Rights Act as initially enacted in 1965 was not applicable to the state judicial electoral process. The original Section 2 paraphrases the Fifteenth Amendment to the United States Constitution which binds everyone. It is the "results" test set forth in Section 2(b) which the respondents have always contended was not intended to embrace state judicial electoral processes.

A. The Louisiana State Court Judiciary System Involved In This Case.[2]

1. Courts of Appeal

There are five Courts of Appeal in Louisiana. Each of the five is divided into separate election districts. In those districts which contain more than one judge, the judges are elected through at-large voting from the entire district. Additionally, some of the circuits have judges who are elected at-large from the entire circuit. The appellate jurisdiction for these courts extends to all civil matters, all family and juvenile court matters, and substantially all criminal matters, except capital cases. At the time of the institution of this suit 42 judges were elected by district and 6 judges were elected at-large.

2. District Courts

There are forty District Courts in the State of Louisiana, together with both a Civil and Criminal District Court in the Parish of Orleans. Where the district contains more than one judge, the judges are elected at-large from the entire district. They are the primary courts of original jurisdiction for both civil and criminal matters, except in Orleans where these functions are separated. At the time of the institution of this suit 156 judges were elected to serve in the districts outside of Orleans Parish. In Orleans Parish there were 10 criminal district court judges and 12 civil district court judges.

3. Family Court

There is one Family Court in Louisiana. It is located in East Baton Rouge Parish. The three judges who preside over

---

[2] Additionally, Louisiana has Justice of the Peace, City, Municipal, Parish and Juvenile Courts, none of which are involved in this litigation. Louisiana also has a Supreme Court which is not involved in this litigation, but which has one of its districts under challenge in *Chisom, et al v. Roemer, et al.*, Docket Number 90-757, before this Court. A Petition for Certiorari is pending.

this Court are elected at-large from the entire parish. The Family Court has jurisdiction in East Baton Rouge Parish which generally encompasses matters pertaining to children under seventeen years of age, nonsupport, adoptions and matrimonial matters.

B. Prior Proceedings In This Litigation.

Early in the proceedings it was the district court's announced belief that

> [I]t needs to be repeated that this court views the problem if there is one, as a problem with the *system* – not individual judicial districts. Obviously there must be evidence that the system produces unlawful results and those results will appear in individual districts, but it is the *system*, not the judicial district, which produces the violation.

Unreported Minute Entry, United States District Court, Middle District of Louisiana, July 5, 1988.

As is customary in this type of litigation, this case was bifurcated so as to permit a liability phase, to be followed, if necessary, by a remedy phase. After a four day trial on liability, the district court issued the following Ruling on August 10, 1988:

> Because of my conviction that there are legally significant differences between judicial elections and legislative elections, it is my view that the remedy for Section 2 violations which are produced by the judicial election system, is to change the system, not to create sub-districts within district courts.

There followed the following Order of August 11, 1988:

> IT IS HEREBY ORDERED that the Governor, the Secretary of State, the Attorney General, and all other election officials, in their official capacities, as well as their attorneys, agents and representatives are hereby preliminarily enjoined from conducting any family court, district court, or court of appeal election which was scheduled for the October 1, 1988 (primary) and November 8, 1988 (general) elections, whether specifically enumerated or

> not and no certification shall issue to any candidate who qualified for any such election without opposition.

The district court ultimately held in the liability phase:

> Even though no specific Section 2 violation may exist in a particular district at this time, the system employed by the state will allow the creation of a violation, given time.
>
> The remedy is to revise the system – to cast about for alternative procedures under which black voters would have a better chance to elect judicial candidates of their choice. * * *
>
> Accordingly, the preliminary injunction previously issued will be made permanent and will be expanded to enjoin all family court, district court, and court of appeal elections until revisions in the electorial [sic] process are made. * * *
>
> This court can only repeat what it has said many times already. State district court districts are jurisdictional. They may not be redrawn, combined and manipulated in the same fashion as legislative districts. There are grave problems in attempting to create subdistricts within a district court jurisdiction. Tinkering with the districts is not the answer.

Clark v. Edwards, 725 F.Supp. 285, at 302-303, 307 (M.D.La. 1988).

On appeal the United States Court of Appeal for the Fifth Circuit vacated the Injunction. *Clark v. Roemer*, 88-3626 (5th Cir. 1988 unreported).

The petitioners then filed an Application for Stay with this Court on September 10th, 1988, in an attempt to vacate the Fifth Circuit Order. *Clark v. Roemer*, A-198, October Term, 1988. The Application for Stay was denied by Justice White. It was resubmitted to Justice Marshall who in turn submitted it to the full Court where it was denied. *Clark v. Roemer*, 487 U.S. 1266, 109 S.Ct. 29, 101 L.Ed.2d 979 (1988).

Respondents filed a Motion to Recall and Recast Findings of Fact and Conclusions of Law liability phase as entered on the 15th day of August, 1988. *Clark v. Roemer*, 725 F.Supp. 285 (M.D.La. 1988). This was based upon the district

court's conclusion that a systematic corrective measure should be the remedy for the violations found by the court, rather than a remedy which is district specific. The Motion set forth that neither the plaintiffs had shown nor had the court found violations in 18 of the district courts and in five of the courts of appeal districts. The Motion further asserted that neither the plaintiffs had shown nor had the court found evidence to support the three threshold criteria as established in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). This assertion involved 10 district courts, 8 courts of appeal districts, and 1 court of appeal district at-large.

After a trial on the Remedy Phase the district court issued its Findings of Fact and Conclusions of Law Remedy Phase. The Court stated:

> Throughout the course of this litigation, this court has marched to the solitary beat of its own drum, insisting that if Louisiana's system for selecting its judges produces violations of Section 2 of the Voting Rights Act, the remedy should be to revise the system, not to make adjustments in a few "guilty" districts which may well need adjusting again in the future. (See, for example, the views expressed at 725 F.Supp. at 294-295) None of the parties – plaintiffs, defendants, or intervenors – have joined the court's march. Each insists that, as a finding of a Section 2 violation is district specific, so any remedy must also be limited to districts in which specific violations have been found. For reasons stated later, the court concludes that it lacks the power to impose a systemic remedy upon the state and that any remedy is indeed limited to "guilty" districts. Both the parties and the appellate court need to be aware of this court's findings of fact. If, because of the Fifth Circuit's resolution of the Texas case, revisions in this court's conclusions of law are required, so be it. Accordingly, it is imperative that the state be permitted to fill judicial vacancies as rapidly as possible, in these districts in which no violation is found.

Clark v. Roemer, ___ F.Supp. ___ (M.D.La. 1990), not yet reported, Slip Opinion, page 3.

After discussing each district and granting respondents' Motion to Recall and Recast Findings of Fact and Conclusions of Law Liability Phase, the district court held:

> For the foregoing reasons, there will be judgment in favor of plaintiffs and against defendants making the injunction previously issued herein permanent as to the first, fourth, ninth, fourteenth, fifteenth, eighteenth, nineteenth, twenty-fourth and fortieth judicial districts and as to the Family Court for the Parish of East Baton Rouge and as to the Court of Appeal First Circuit, District 2. The injunction will be vacated as to all other judicial districts.

Id. at page 54.

On September 28th, 1990, the United States Court of Appeal for the Fifth Circuit rendered its *en banc* decision in the case of *League of Latin American Citizens Council #4434 v. William P. Clements, et al.*, 914 F.2d 620 (5th Cir. 1990) (*en banc*) [hereinafter "LULAC"]. The respondents then filed a Motion to Recall and Recast Findings of Fact and Conclusions of Law Liability Phase, Findings of Fact and Conclusions of Law – Remedy Phase and for the Rendition of a Rule 54(b) Judgment and for the Entry Thereof. The district court then issued an Order on October 19th, 1990:

> IT IS ORDERED that defendants Rule 54(b) Motion be and the same is hereby granted, and that the clerk of this Court enter a final Judgment upon the Order herein dismissing plaintiffs' claim that "the at-large election scheme of electing Appeal, Family, and District Court judges in the State of Louisiana unlawfully dilutes black voting strength and results in the denial of plaintiffs' opportunity to participate equally in the electoral process and to elect judges of their choice, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973," [Plaintiffs' *Fourth Supplemental and Amended Complaint*, prayer, paragraph (b)], pursuant to the *LULAC* decision, and the undersigned expressly determines that there is no just reason for delay in the entry of a final Judgment of this Order.

Petitioners appealed this Judgment to the United States Court of Appeals for the Fifth Circuit, where it was docketed under 90-3785. Thereafter, without further action in the Fifth Circuit, this petition was filed.[3]

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY CONCLUDED IN *LULAC* THAT SECTION 2(b) OF THE VOTING RIGHTS ACT DOES NOT APPLY TO THE JUDICIARY.

A. The *LULAC* Decision.

As previously noted, the district court granted a 54(b) judgment based on the *en banc* decision of the United States Court of Appeals for the Fifth Circuit in *LULAC*.[4] The plaintiffs in *LULAC* challenged the county-wide, at-large

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[3] On the 23rd day of July, 1990, petitioners filed a Motion to a three-judge court to enjoin at-large elections for certain unprecleared judgeships. The proceedings thereafter are, of course, on a separate track and a Jurisdictional Statement in connection therewith was filed with this Court on December 14th, 1990. *Clark v. Roemer*, No. 90-952, October Term, 1990.

[4] This Court has pending before it for consideration a Petition for a Writ of Certiorari as filed by the Houston Lawyers' Association and six individuals on November 21, 1990, *Houston Lawyers' Association v. Mattox*, 90-813, October Term, 1990, and a Petition for a Writ of Certiorari as filed by the League of United Latin American Citizens, Inc., on December 14, 1990, in the matter entitled *League of United Latin American Citizens, Inc. v. Mattox*, 90-974, October Term, 1990. Each of these cases seeks this Court's review of the decision as rendered by the United States Court of Appeal for the Fifth Circuit on September 28, 1990, in *Latin American Citizens Council #4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990) (*en banc*). Pursuant to Supreme Court Rule 37, Louisiana may, without consent, file an amicus curiae brief in each of these cases. At the Clerk's suggestion, since what Louisiana would say is covered in this Response as well as its Response filed in the *Chisom* case, (90-757, October Term, 1990), Louisiana respectfully requests that, to the

(Continued on following page)

election of trial judges in Texas as violative of § 2(b) of the Voting Rights Act and of the United States Constitution. The trial court denied the constitutional claims, finding that the requisite discriminatory intent had not been proven. 914 F.2d at 623. The trial court, however, did find "that the Texas law produced an *unintended* dilution of minority voting strength" in violation of the "results" test of § 2(b) of the Voting Rights Act. 914 F.2d at 623 (emphasis in original). On appeal, a panel of the Fifth Circuit held that § 2(b) did not apply to trial judges because they are single-member officeholders who can be elected only at-large. 902 F.2d 293 (5th Cir. 1990).

The Fifth Circuit granted an *en banc* hearing *sua sponte*. A majority held that judges are not "representatives" within the meaning of § 2(b) of the Voting Rights Act and that the "results" test of § 2(b) does not apply to the judiciary. 914 F.2d 620 (5th Cir. 1990). Five judges concurred, agreeing with the view of the panel that trial judges are single-member officeholders. 914 F.2d at 634. Chief Judge Clark also concurred, limiting the case to its facts. 914 F.2d at 631. Only one Judge, Judge Sam Johnson, dissented. 914 F.2d at 651. After the *en banc* opinion was published, the panel in *Chisom* remanded this case to the district judge with orders to dismiss all Voting Rights Act claims. 917 F.2d 187 (5th Cir. 1990).

(Continued from previous page)

extent permissible, both this Response and the Response in *Chisom* be deemed an *amicus* brief in the *Houston* case as well as the *LULAC* case.

The *LULAC* panel decision and Judge Higginbotham's concurring opinion in the *LULAC en banc* opinion state that the "single-official doctrine" is applicable to judges who act alone such as Texas district judges. *LULAC*, 902 F.2d 293 (5th Cir. 1990); *LULAC*, 914 F.2d 620, 634 (5th Cir. 1990) (*en banc*) (Higginbotham, J., concurring). In the event that this Court holds that Section 2(b) of the Voting Rights Act does apply to the judiciary, Louisiana would argue that this "single-official doctrine" exception is applicable to Louisiana district judges and family court judges who also act alone in making their decisions.

B. The Genesis of § 2(b) of the Voting Rights Act.

Section 2 of the Voting Rights Act of 1965 forbade imposition or application of any "voting qualification or prerequisite to voting, or standard, practice, or procedure" to prevent any citizen from voting on account of race or color. 42 U.S.C. § 1973. This Court in *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), held that enforcement of § 2 required proof of racially-discriminatory intent.

Congress then passed the Voting Rights Act of 1982 amending § 2 to

> restore the "results test" – the legal standard that governed voting discrimination cases prior to [the Supreme Court's] decision in *Mobile v. Bolden* * * * * Under the "results test," plaintiffs are not required to demonstrate the challenged electoral law or structure was designed or maintained for a discriminatory purpose.

Thornburg v. Gingles, 478 U.S. 30, 43 n. 8, 106 S.Ct. 2752, 92 L.Ed.2d 25, 42 n. 8 (1986) (citations omitted). In writing § 2(b), Congress chose – with one significant exception – the words of Justice White in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). Justice White stated that plaintiffs' burden of proof was to show:

> that its members had less opportunity than did other residents in the district to participate in the political processes and to elect *legislators* of their choice.

412 U.S. at 766, 93 S.Ct. at 2339, 37 L.Ed.2d at 324 (emphasis supplied). Section 2(b) provides that a plaintiff class of citizens must show:

> that its members have less opportunity than other members of the electorate to participate in the political process and to elect *representatives* of their choice.

42 U.S.C. § 1973(b) (emphasis supplied). As the majority in *LULAC* recognized, the choice of the word "representatives" was a deliberate one: "the Congress was at some pains to adapt and broaden the Court's phrases so as to convey its precise meaning." 914 F.2d at 625.

C. This Court has always held that Judges are not "representatives."

As stated in the prior section, § 2(b) applies to "representatives." Members of the legislative and executive branches are certainly representatives, and the case law is replete with decisions holding that § 2(b) applies to such entities. *See, e.g., Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1534, 103 L.Ed.2d 839 (1989) (city council and mayor); *Edge v. Sumter County School District*, 775 F.2d 1509 (11th Cir. 1985) (school board); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135, 105 S.Ct. 2673, 86 L.Ed.2d 692 (1985) (city aldermen); *United States v. Marengo County Commission*, 731 F.2d 1546 (11th Cir.), *appeal dismissed & cert. denied*, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984) (county commission); *Velasquez v. City of Abilene*, 725 F.2d 1017 (5th Cir. 1984) (city council); *Brown v. Board of School Commissioners of Mobile County*, 706 F.2d 1103 (11th Cir.), *affirmed*, 464 U.S. 1005, 104 S.Ct. 520, 78 L.Ed.2d 705 (1983) (board of school commissioners); *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss.), *affirmed*, 469 U.S. 1002, 105 S.Ct. 416, 83 L.Ed.2d 343 (1984) (congressmen).

Judges, however, traditionally have not been considered "representatives." This Court so held by affirming a three-judge court voting rights decision that the "one-man, one-vote" concept does not apply to the judiciary. *Wells v. Edwards*, 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973). In refusing to apply "one-man, one vote" precepts, the three-judge court reasoned as follows:

> [A]s stated in Buchanan v. Rhodes [249 F. Supp. 860 (N.D. Ohio 1960), *appeal dismissed*, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966)]:
>
> > "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.

> "The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government." New York State Association of Trial Lawyers v. Rockefeller, 267 F.Supp. 148, 153.

Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972) (three-judge court). The *LULAC* majority opinion reasons that "[i]t is impossible, given the single point at issue and the simple reasoning stated, to believe that the majority of the Supreme Court, in affirming *Wells*, did not concur in that reasoning." 914 F.2d at 627.

Similarly, Justice Frankfurter has stated: "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society." *Dennis v. United States*, 341 U.S. 494, 575, 71 S.Ct. 857, 95 L.Ed. 1137, 1160-61 (1951) (Frankfurter, J., concurring in the judgment). And Justice Stewart has contrasted the Court's duty with that of the people's representatives:

> It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected *representatives* to repeal it.

Griswold v. Connecticut, 381 U.S. 479, 530-31, 85 S.Ct. 1678, 14 L.Ed.2d 510, 542 (1965) (Stewart, J., dissenting) (emphasis supplied).

D. Other Federal Courts have held that Judges are not "representatives."

The lower federal courts have also held that judges are not representatives. The plaintiffs in *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971) (three-judge court), attacked the North Carolina system of nominating judges by districts and electing them statewide, contending that it denied voters equal protection of the laws. They cited, *inter alia*, *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), and

Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). The court distinguished these and the other cases because they "dealt with the election of the representatives of the people – officials who make laws, levy and collect taxes, and generally manage and govern people." 335 F. Supp. at 930. After discussing two precedents involving reapportionment, the court stated:

> While *Buchanan [v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio 1960), *appeal dismissed*, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966)] and [*New York State Association of Trial Lawyers v.] Rockefeller* [267 F. Supp. 148 (S.D.N.Y. 1967], deal with the apportionment of judges rather than their election, they nevertheless point up the many pitfalls and briar patches which the courts will encounter if the one man, one vote principle is made applicable to the judiciary. The function of judges, contrary to some popular views of today, is not to make, but interpret the law. They do not govern nor represent people nor espouse the cause of a particular constituency. They must decide cases exclusively on the basis of law and justice and not upon the popular view prevailing at the time.

335 F. Supp. at 932. The *Holshouser* case was affirmed by the Supreme Court. 409 U.S. 807, 93 S.Ct. 43, 34 L.Ed.2d 68 (1972).

A similar system of electing judges in Georgia was upheld in *Stokes v. Fortson*, 234 F. Supp. 575 (N.D. Ga. 1964) (three-judge court). The court stated:

> [E]ven assuming some disparity in voting power, the one man-one vote doctrine, applicable as it now is to selection of legislative and executive officials, does not extend to the judiciary. Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency. Moreover there is no way to harmonize selection of these officials on a pure population standard with the diversity in type and number of cases which will arise in various localities, or with the

> varying abilities of judges and prosecutors to dispatch the business of the courts. An effort to apply a population standard to the judiciary would, in the end, fall of its own weight.

234 F. Supp. at 577.

In two New York cases the plaintiffs sought judicial reapportionment on the basis of population, again relying on legislative reapportionment cases such as *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). In *New York State Association of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967), the court rejected the comparison, stating that:

> The state judiciary, unlike the legislature, is not the organ responsible for achieving representative government. Nor can the direction that state legislative districts be substantially equal in population be converted into a requirement that a state distribute its judges on a per capita basis.
>
> * * * *
>
> In contrast to legislative apportionment, population is not necessarily the sole, or even the most relevant, criterion for determining the distribution of state judges. The volume and nature of litigation arising in various areas of the state bears no direct relationship to the population of those areas.

267 F. Supp. at 153-54. A three-judge court rejected a similar suit in the Eastern District of New York, quoting the *Rockefeller* opinion's statement that the state judiciary is not "responsible for achieving representative government." *Kail v. Rockefeller*, 275 F. Supp. 937, 941 (E.D.N.Y. 1967) (three-judge court).

The Ohio judicial structure guaranteeing each county at least one judge in the court of general jurisdiction came under attack in *Buchanan v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio 1966), *appeal dismissed*, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966), *vacated*, 400 F.2d 882 (6th Cir. 1968), *cert. denied*, 393 U.S. 839, 89 S.Ct. 118, 21 L.Ed.2d 110 (1968). Once again, the complaint was predicated upon the Supreme Court's reapportionment cases. The court noted that when representatives to a legislative body are malapportioned, the voting strength of individual citizens becomes

unequal, causing a dilution of power. 249 F. Supp. at 865. Judges, however, are not governed by such a rule:

> But in determining the reasonableness of a judicial system which permits at least one judge operating a court of general jurisdiction in each county, we must recognize one glaring distinction between the functions of legislators and the functions of jurists. Judges do not represent people, they serve people.

249 F. Supp. at 865.[5]

E. The Term "representatives" is not a Synonym for "elected officials".

Earlier sections of this Response demonstrate that this Court and the lower federal courts do not consider judges to be "representatives." This section argues that the word "representative" as used in § 2(b) is not synonymous with "elected official" and should instead be given its commonly understood meaning. This Court has laid down definitive

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[5] Numerous other decisions make a similar distinction between judges and representative officials. *See Gilday v. Board of Elections of Hamilton County*, 472 F.2d 214, 217 (6th Cir. 1972) (rejecting application of one-man, one-vote to judicial selection in Ohio and holding "that equal protection does not require the allocation of state judges on this basis"); *Sagan v. Commonwealth of Pennsylvania*, 542 F. Supp. 880, 882 (W.D. Pa. 1982) (distinguishing judicial candidates from legislative and executive candidates because judges administer the law rather than espouse the cause of a particular constituency); *Fahey v. Darigan*, 405 F. Supp. 1386, 1391 n. 6 (D.R.I. 1975) (holding one-man, one-vote precepts inapplicable to "the selection of officials not intended to serve in a representative role, such as judges"); *Buchanan v. Gilligan*, 349 F. Supp. 569, 571 (N.D. Ohio 1972) (three judge court) (rejecting application of one-man, one-vote to Ohio judiciary because "[t]he state judiciary is not responsible for achieving representative government"); *Romiti v. Kerner*, 256 F. Supp. 35, 46 (N.D. Ill. 1966) (three judge court) (expressing "little doubt" that "there is a valid distinction between applying the 'one man, one vote' rule in a legislative apportionment case to the election of a state supreme court judiciary").

guidelines for construing language which appears in Congressional acts.

In *Consumer Products Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980), the Court stated:

> We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself.

447 U.S. at 108, 100 S.Ct. 2051, 64 L.Ed.2d at 773.

Four years later, in furtherance of this concept of construction, the Court held in *Escondido Mut. Water Co. v. La Jolla Indians*, 466 U.S. 765, 104 S.Ct. 2105, 80 L.Ed.2d 753 (1984):

> Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that " '[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.' "

466 U.S. at 772, 104 S.Ct. 2105, 80 L.Ed.2d at 761 (citations omitted).

And in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983), the Court said:

> [W]e state once again the obvious when we note that, in determining the scope of a statute, one is to look first at its language * * * * If the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is " 'a clearly expressed legislative intent to the contrary.' "

460 U.S. at 110, 103 S.Ct. 986, 74 L.Ed.2d at 853 (citations omitted).

The term "representatives" refers to those who serve a specialized constituency and whose role is to represent the needs and interests of that constituency. The term "representatives" has never been commonly accepted as including the judicial branch; indeed, the reverse is true – namely, the judicial branch always has been treated as separate and distinct from the two representative arms of government.

A representative of a district, be it federal, state, or local, exists to serve and favor his or her constituency, while also

working for the good of the governmental jurisdiction as a whole. United States representatives are expected to help obtain government contracts for their districts; no one, however, would expect a federal judge to uphold such a contract citing as a reason the need of his area for governmental business. State legislators are expected to seek bridges and roads for their districts; no one, however, would expect a state judge to mandate that such bridges and roads be built merely because the people want them. City councilmen are expected to promote drainage projects for their council district; no one, however, would expect a city judge to require them to keep his voters happy.

Judges thus are not representatives; further, they should not be representatives. The larger the constituency, the less parochial pressures can be brought to bear. An advantage to at-large elections for judges is that judges can make the difficult decisions without undue fear of dissatisfaction in the electorate. A judge would be much less likely to vote against the residents of a neighborhood on a zoning issue if that judge was elected solely by that neighborhood. Justice ought to be identical throughout a judicial system; electing judges from neighborhoods, however, might make for a system of individualized justice currently foreign to the United States. Admittedly, many problems could be cured on appeal; however, it can be extremely difficult to reverse a detailed record of fact-finding even when the facts have been slanted. Further, the petitioners here seek to make appellate districts smaller also, again lessening the number and mix of a judge's electorate.

Congress, had it wanted specifically to include judges under Section 2(b) of the Voting Rights Act, could have done so by substituting the term "elected official" for the term "representative"; it did not do so. In a representative form of government, such as ours, it is always true that a "representative" is an "elected official"; however, the converse is *not* always true.

Representatives have a constituency which numbers in the hundreds to hundreds of thousands, to each of whom they owe fidelity and from many of whom they are likely, sooner or later, to receive correspondence or a telephone call or even

perhaps a personal visit. Judges have but one constituency, the blindfolded lady with the scales and sword.

F. The Fundamental Difference Between "representatives" and Members of the Judiciary is Deeply Rooted in this Country's History.

In holding that "the judiciary serves no representative function whatsoever," 914 F.2d at 625, the *LULAC* Court quoted Professor Eugene Hickok as stating that, "The judiciary occupies a unique position in our system of separation of powers, and that is why the job of a judge differs in a fundamental way from that of a legislator or executive." Hickok, "Judicial Selection: The Political Roots of Advice and Consent" in *Judicial Selection: Merit, Ideology and Politics* 5 (National Legal Center for the Public Interest 1990), *quoted at* 914 F.2d at 926.

Other scholars have also recognized this difference. Professor G. Edward White has written in *The American Judicial Tradition* that the American judicial tradition emerged with Chief Justice John Marshall.[6] A core element of that tradition has always included "a measure of true independence and autonomy for the appellate judiciary from the other two branches of government." *Judicial Tradition* 9. Professor White summarized Chief Justice Marshall's views concerning the judiciary as follows:

> An independent judiciary was logically the ultimate necessity in Marshall's jurisprudence, the culmination of his beliefs about law and government. He sought to show that judicial independence was not merely a side effect of federalism but a first principle of American civilization * * * * Against the potential chaos attendant on mass participatory democracy, republicanism erected the institutional buffers of legislative representatives and an independent judiciary. The excesses of the people were moderated by representation, a process by which

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[6] Citations are hereinafter abbreviated as *Judicial Tradition*. Page references refer to the 1978 Oxford University Press paperback edition.

> their passionate demands were reformulated by an enlightened and reasonable class of public servants. The need of the populace for an articulation of their individual rights under law was met by the presence of a body of judges not beholden to the masses in any immediate, partisan sense.

Judicial Tradition 18, 20.

Chief Justice Marshall's vision of the American judicial tradition was not unique. Alexander Hamilton "envisaged judicial review as an exercise in politics through which an independent judicial elite could temper the democratic excesses of legislatures by affirming the republican political balances inherent in the Constitution." *Judicial Tradition* 24. Some of the Founding Fathers thought an independent judiciary necessary because "even a government made up of the people's representatives was not a sufficient buffer against the excesses of the mob." *Judicial Tradition* 320.

This American judicial tradition has also been applicable to the state judiciary. Professor White commented that the state constitutions "were patterned on the federal Constitution, with its tripartite division of powers." *Judicial Tradition* 109. James Kent, Chief Judge of the New York Supreme Court and later Chancellor of New York, "viewed the judiciary as a buffer between established wealth and the excessively democratic legislature." *Judicial Tradition* 112. Much more recently, Chief Justice Roger Traynor of the California Supreme Court wrote that judges "enjoyed a 'freedom from political and personal pressures and from adversary bias' [and that] [t]heir 'environment for work' was 'independent and analytically objective.' " *Judicial Tradition* 296, quoting Traynor, "Badlands in an Appellate Judge's Realm of Reasons," 7 Utah L.Rev. 157, 167, 168 (1960).

Professor White traced "modern liberalism" trends throughout the Twentieth Century. According to this political theory, judges "were not, by and large, representatives of the people, and their nonpartisan status insulated them from the waves of current opinion." *Judicial Tradition* 320. Legislatures, on the other hand, "were 'representative of popular opinion' and could 'canvass a wide spectrum of views.' "

Judicial Tradition 322. One Twentieth Century Justice, Felix Frankfurter, has called the judiciary the "antidemocratic, unrepresentative" branch of government." *Judicial Tradition* 367.[7]

Various legal theorists have also stated that judges are not "representatives." Perhaps the most provocative book to appear on judicial review during the last few years is *Democracy and Distrust* by Professor John Hart Ely.[8] Professor Ely contrasts the role of the courts with the role of the representative branch of government, the legislative branch. He sought an approach to judicial review "not hopelessly inconsistent with our nation's commitment to representative democracy." *Democracy and Distrust* 41. In his book, Professor Ely developed a representation-reinforcing theory of judicial review in which the non-representative branch (the judiciary) would review legislation to determine the motivation of the representative branch (the legislature) to make sure that the views of all groups were represented in lawmaking. He concluded by stating that "constitutional law appropriately exists for those situations where representative government cannot be trusted." *Democracy and Distrust* 183.

Professor Alexander Bickel spoke of the importance of judicial independence in *The Supreme Court and the Idea of Progress*.[9]

> The restraints of reason tend to ensure also the independence of the judge, to liberate him from the demands and fears – dogmatic, arbitrary, irrational, self-or group-centered, – that so often enchain other public officials. They make it possible for the judge, on some occasions, at any rate, to oppose

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[7] Professor Lawrence Friedman also has written about the history of a strong, independent judiciary in both federal and state governmental systems. L. Friedman, *A History of American Law* 116, 118 (Simon & Schuster 1973 paperback edition).

[8] Page references are to the 1980 Harvard University Press hardbound edition.

[9] Citations are hereinafter abbreviated as *Supreme Court and Progress*. Page references refer to the 1978 Yale University Press paperback edition.

> against the will and faith of others, not merely his own will or deeply-felt faith, but a method of reaching judgments that may command the allegiance, on a second thought, even of those who find a result disagreeable. The judge is thus buttressed against the world, but what is perhaps more significant and certain, against himself, against his own natural tendency to give way before waves of feeling and opinion that may be as momentary as they are momentarily overwhelming.
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> * * * *
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> The independence of the judges is an absolute requirement if individual justice is to be done, if a society is to ensure that individuals will be dealt with in accordance with duly enacted policies of the society, not by the whim of officials or of mobs, and dealt with evenhandedly, under rules that would apply also to others similarly situated, no matter who they might be.

Supreme Court and Progress 82, 84.

Professor Bickel contrasted the Court with the people and its representatives, stating, "Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives." *Supreme Court and Progress* 91.[10]

G. The "dichotomy" between Sections 2 and 5 of the Voting Rights Act.

The petitioners argue on pages 12-13 of the Petition that there is a dichotomy between Section 2 and Section 5 of the Voting Rights Act because the Attorney General is barring creation of new at-large judgeships in Louisiana based on Section 5 objections. Of course, the Section 5 question is the

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[10] *Supreme Court and Progress* also contains much material on reapportionment. *Supreme Court and Progress* 35, 158-59, 168-73. Never in that discussion is there any intimation that reapportionment requires judicial redistricting. Indeed, such a notion would run counter to Professor Bickel for his strong arguments for judicial independence.

subject of another case before this Court.[11] At any rate, the Justice Department's position apparently is not that the addition of a new judge in a judicial district was a change made because of racial animus, but instead that the Justice Department is opposed to the at-large system of electing judges, a system in effect in Louisiana since 1946, *see* LA. R.S. 13:582-585, predating by decades the Voting Rights Act of 1965. *See Beer v. United States*, 425 U.S. 130, 139, 96 S.Ct. 1357, 47 L.Ed.2d 629, 638 (1976).

At the hearing before the three judge court in *Clark* on October 18, 1990, the Justice Department steadfastly refused to explain why it was not preclearing the additional seats even though the Department stated in writing that its objection was "not to the number of judges *per se*", Appendix 2, and that it did not question the State of Louisiana's "need for or purpose in creating new judgeship positions." Appendix 12. Instead, as is clear by the September 17, 1990, letter, Appendix 11, the Justice Department objects to Louisiana's long-standing system of electing judges, and instead prefers other "systems" such as limited voting.[12]

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[11] On December 14, 1990, these same petitioners filed a Jurisdictional Statement to review a three-judge court opinion in this case. *Clark v. Roemer*, No. 90-952. That matter is pending.

[12] Limited voting is a system under which each voter cannot vote for every position on the ballot. For example, if there were ten positions to be elected in an area with a 40% minority population, limited voting would give each voter only four votes. Therefore, imposition of a limited voting system would itself appear to violate the provisions of the Voting Rights Act, which provides that nothing in the Act "shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision." 42 U.S.C. § 1973n. Further, limited voting has been uniformly rejected as a judicial remedy in Voting Rights Act cases. In *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988), a Voting Rights Act case involving the judiciary, the district court called it "experimental," "contrary to most election laws of Mississippi and the policy contained therein," and

(Continued on following page)

While the Justice Department cannot "unpreclear" the seats it has previously approved, a total of 222 judgeships out of a judiciary consisting of 240 judges, and while its current objections affect only 18 seats in 11 judicial districts, the Justice Department candidly concedes that it seeks to uproot and destroy the entire Louisiana judicial election system.[13] By ignoring the decision in this case that the Louisiana "system" of electing judges cannot violate Section 2 of the Voting Rights Act, by ignoring the precepts in *Thornburg v. Gingles*, 478 U.S. 30, 56, 106 S.Ct. 2752, 92 L.Ed. 25, 50 (1986), which holds that any remedy under Section 2 must be district-specific and not systemic, and by ignoring the *LULAC* decision, the Justice Department's position flies in the face of judicial authority and violates its own internal rule requiring that preclearance determinations be guided by relevant federal judicial decisions. *See* 28 C.F.R. Ch. 1 (7-1-89 Edition) § 5.56.

If there is a "dichotomy" between Sections 2 and 5,[14] it is caused not by the eminently correct decision in this case and *LULAC*, but rather by the attempt of the Justice Department to rewrite Section 5 while depriving Louisiana of desperately needed judges in areas of the State concerning which the lower court held there is no Section 2 violation, and through

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(Continued from previous page)

"contrary to most general concepts of a democratic two-party system." *Id.* at 337. Limited voting for judges was held violative of the Pennsylvania Constitution in *Mezvinsky v. Davis*, 459 A.2d 307 (Pa. 1983). Uncontested evidence during the remedy phase of this case showed that limited voting has been adopted as a "system" in only approximately 200 of the more than 86,000 local governmental units in this country. Cumulative voting means one can cast votes numerically dependent upon the total number of elective positions. For instance, if a Parish has 14 district judges then a voter can cast all 14 votes for one of these district judges.

[13] *See* Appendix 4-16.

[14] That there are differences between Sections 2 and 5 of the Voting Rights Act is no surprise. For example, a Section 2 violation can exist even when the affected jurisdiction has received Section 5 preclearance, and the "results test" was added in 1982 to Section 2, although that same change was not made in Section 5.

an election process which *LULAC* holds cannot violate Section 2.[15]

It is not Louisiana's position that Section 5 is completely inapplicable to the judiciary any more than it is Louisiana's position that Section 2 is completely inapplicable to the judiciary. If a state passed a statute imposing a poll tax for judicial elections, or allowing only voters of one race to vote for judicial officials, such laws would violate both Section 2 and Section 5, as well as the Fourteenth and Fifteenth Amendments. No such intentional discrimination is claimed in this case by the Justice Department. When, as here, however, a law simply adds a much-needed judicial seat to a multi-member district, in the absence of discriminatory intent such a statute is not covered by either Section 2 (because the "results test" is inapplicable to the judiciary) or by Section 5 (because Section 5 cannot be used as a guise to preclude a state from adding a judicial seat when such a seat cannot be enjoined under Section 2).

II. IF THE ONE-MAN, ONE-VOTE REQUIREMENT DOES NOT APPLY TO THE JUDICIARY, THE CONCEPT OF MINORITY VOTE DILUTION SET FORTH IN § 2(B) DOES NOT APPLY TO THE JUDICIARY.

This Court has held that the one-man, one-vote requirement does not apply to the judiciary. *Wells v. Edwards*, 409 U.S. 1095, 93 S.Ct. 904, 34 L.E.2d 679 (1973). If this requirement is inapplicable, the concept of minority vote dilution in at-large districts is similarly inapplicable to the judiciary. As the Fifth Circuit held in *LULAC*:

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[15] Indeed, if there is a "dichotomy" in the applicability of the Voting Rights Act to Louisiana's judiciary, it is in the Justice Department's inconsistent treatment of additional judgeships. In two letters dated September 17, 1990, the Justice Department stated that portions of Act 8 of 1990 adding judgeships would not be precleared, but other portions of the same statute adding judgeships were precleared. *Compare* Appendix 4, 12 and 16 *with* Appendix 19.

> Absent the one-person, one-vote rule – that the vote of each individual voter must be roughly equal in weight to the vote of every other individual voter, regardless of race, religion, age, sex, or even the truly subjective and uniquely individual choice of where to reside – there is no requirement that any individual's vote weigh equally with that of anyone else. This being so, and no such right existing, we can fashion no remedy to redress the non-existent wrong complained of here.
>
> The notion of *individual* vote dilution, first developed by the Supreme Court in Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), was the foundation for the concept of *minority* vote dilution to be later elaborated in Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), White v. Regester, [412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973)], and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973). Individual vote dilution was remedied by the Court through the concept of one-person, one-vote – the guarantee of substantial equality among individual voters. With that guarantee in mind, remedial schemes to combat minority vote dilution were devised on a case by case basis.

914 F.2d at 627 (emphasis in original). The Senate Report concerning the 1982 amendment to the Voting Rights Act states "[t]he principle that the right to vote is denied or abridged by dilution of voting strength derives from the one-person, one-vote reapportionment case of *Reynolds v. Sims*." S.Rep.No. 417, 97th Cong. 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News at 177, 196.

The key issue, therefore, is whether Section 2(b) of the Voting Rights Act enshrines the "one-man, one-vote" principle as the touchstone test. If it does, then it cannot be used to analyze judicial elections, because the "one-man, one-vote" test was expressly rejected as applying to the judiciary in *Wells v. Edwards*, 347 F.Supp. 453 (M.D. La. 1972), *affirmed* 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973).

The express language of the plurality opinion in *Gingles*, bolstered by the language of the concurring opinions, shows

that Section 2(b) is solely a "one-man, one-vote" litmus test. Justice Brennan, in speaking for the plurality, began by noting that when Section 2 of the Voting Rights Act was amended in 1982 to add Section 2(b), the Congressional revision was a response to the plurality opinion in *Mobile v. Bolden*, 478 U.S. at 35, 106 S.Ct. at 2759, 92 L.Ed.2d at 37. The plurality in *Gingles*, in interpreting what evidence it takes under Section 2(b) to prove a Section 2(a) violation, established a three-fold test:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. * * * Second, the minority group must be able to show that it is politically cohesive. * * * Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it, – in the absence of special circumstances, such as a minority candidate running unopposed * * * usually to defeat the minority's preferred candidate * * * * In establishing this last circumstance, the minority group demonstrates that the submergence in a white multimember district impedes its ability to elect its chosen representatives.

478 U.S. at 50-51, 106 S.Ct. at 2766-67, 92 L.Ed.2d 46-47.

As Justices O'Connor, Powell, Rehnquist, and Chief Justice Burger recognized in their concurring opinion in *Gingles*, this three-fold test equates to a requirement of proportional representation; i.e., one-man, one-vote. Justice O'Connor, speaking for these Justices, stated:

> Third, although the Court does not acknowledge it expressly, the combination of the Court's definition of minority voting strength and its test for vote dilution results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts.

478 U.S. at 85, 106 S.Ct. at 2784-2785, 92 L.Ed.2d at 69.

> In my view, the Court's test for measuring minority voting strength and its test for vote dilution, operating in

> tandem, come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2.

478 U.S. at 94, 106 S.Ct. at 2789, 92 L.Ed.2d at 74.

> The Court's standard for vote dilution, when combined with its test for undiluted minority voting strength, makes actionable every deviation from usual, rough, proportionality in representation for any cohesive minority group as to which this degree of proportionality is feasible within the framework of single-member districts. Requiring that every minority group that could possibly constitute a majority in a single-member district be assigned to such a district would approach a requirement of proportional representation as nearly as is possible within the framework of the single-member districts. Since the Court's analysis entitles every such minority group usually to elect as many representatives under a multi-member district school, *it follows that the Court is requiring a form of proportional representation.*

478 U.S. at 97, 106 S.Ct. at 279, 92 L.Ed.2d at 76-77 (emphasis supplied).

Justice O'Connor, and the other Justices who joined in her concurring opinion, recognized that proportional representation (one-man, one-vote) is the result of the plurality's opinion. It was exactly this type of proportional representation that the plurality in *Mobile v. Bolden* had *rejected* in its analysis of both Section 2 (pre-1982 amendments) and the Fourteenth and Fifteenth Amendments:

> The theory of [Justice Marshall's] dissenting opinion – a theory much more extreme than that espoused by the District Court or the Court of Appeals – appears to be that every "political group," or at least every such group that is a minority, has a federal constitutional right to elect candidates in proportion to its numbers. * * *
>
> Whatever appeal the dissenting opinion's view may have as a matter of political theory, it is not the law.

446 U.S. at 75, 100 S.Ct. at 1504, 64 L.Ed.2d at 63-64.

The plurality in *Mobile* recognized that what is now Section 2(a) does not require a "proportionality" test. Section 2(a) was not substantially changed in the 1982 amendments. Thus, if Section 2(b) establishes a "one-man, one-vote" test, then under *Wells* it cannot be used against the judiciary.

The petitioners may take the position that there is a distinction between a "proportionality" test and a "one-man, one-vote" test. Such an argument would be unavailing, as the plurality opinion in *Mobile v. Bolden* expressly recognized.

After discussing (and rejecting) the dissent's argument concerning proportionality, the plurality in *Mobile* went further and determined that the "proportionality" argument equated to a "one-man, one-vote" test.

> The dissenting opinion erroneously discovers the asserted entitlement to group representation within the "one person, one vote" principle of *Reynolds v. Sims, supra*, [377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)] and its progeny.

446 U.S. at 77, 100 S.Ct. at 1505, 64 L.Ed.2d at 65. As *Mobile v. Bolden* recognized, the term "vote dilution" is equivalent to holding that there is a "one-man, one-vote" test. 446 U.S. at 78, 100 S.Ct. at 1505, 64 L.Ed.2d at 65-66. As the plurality in *Mobile v. Bolden* stated:

> There can be, of course, no claim that the "one-person, one-vote" principle has been violated in this case * * * it is therefore obvious that nobody's vote has been "diluted" in the sense in which that word was used in the *Reynolds* case.
>
> * * *
>
> It is, of course, true that the right of a person to vote on an equal basis with other voters draws much of a significance from the political associations that its exercise reflects, but it is an altogether different matter to conclude that political groups themselves have an independent constitutional claim to representation.

446 U.S. at 78, 100 S.Ct. 1505, 1507, 64 L.Ed.2d at 65, 66.

Because *Gingles* involves only the interpretation of Section 2(b), and because *Wells* prohibits the use of a "one-man, one-vote" test involving judicial elections, it is clear that the

Section 2(b) results test cannot be used to prove a violation of Section 2(a) in judicial elections.

The concept of dilution of group voting strength [which is embodied in subsection (b) of amended Section 2] rests on two assumptions: (1) that each person's vote should have the same weight as another person's vote, and (2) that a given (protected) group should wield roughly the aggregate voting strength of its members. *See Zimmer v. McKeithen*, 485 F.2d 1297, 1303 (5th Cir. 1973). If the first assumption is not true, the second cannot be made. For *without* the assumption of substantial equality among voting shares made possible by the one-man, one-vote principle, no aggregate measure of minority voting strength – and therefore no measure of dilution of that strength – is conceivable. Because the one-man, one-vote rule does *not* apply to the judiciary, the conceptually dependent notion of minority group vote dilution, embodied in subsection (b), has no field of operation in judicial elections.

This argument has nothing to do with statutory interpretation, does not depend on a particular construction of the word "representative" as used in subsection (b), and is not based on whether Congress intended that amended Section 2 have some field of operation with respect to judicial elections. It is, instead, based on an explanation of why, regardless of what breadth Congress intended for amended Section 2, minority group vote dilution – as that concept has developed in the voting rights jurisprudence – simply cannot exist unless the one-man, one-vote rule applies.

Thornburg v. Gingles, the Court's definitive exegesis of Section 2 vote dilution, sharpens this point. In her concurring opinion, Justice O'Connor, joined by Powell, Rehnquist, and Chief Justice Burger, notes that "[i]n order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2 . . . it is . . . necessary to construct a measure of 'undiluted' minority voting strength." *Gingles*, 478 U.S. at 88, 106 S.Ct. 2786, 92 L.Ed.2d at 71. There is no doubt that the yardstick adopted by the *Gingles* Court – a calculation of the minority's potential voting strength in a single-member district system – rests on the assumption that

the one-man, one-vote rule applies and that each district has roughly the same population. *See* 478 U.S. at 50-51 n. 17, 89-90, 106 S.Ct. 2766-67 n. 17, 2787, 92 L.Ed.2d at 46-47 n.17, 72. Otherwise, to paraphrase Justice Harlan, the Court would be unable even to measure what it purports to equalize. *Whitcomb v. Chavis*, 403 U.S. at 169, 91 S.Ct. 1883, 29 L.Ed.2d at 391 (Harlan J., separate opinion).

Without the measure of individual voting strength provided in legislative cases by the one-man, one-vote rule, *Gingles'* first prong is meaningless in the judicial context. It is always possible to construct a geographically compact black voting majority district by continuing to reduce the total population in that district down to, if necessary, a minimum of one. There are no "judicially discernable and manageable standards" by which a court could find that a given judicial election system does *not* dilute minority voting strength if the population size of the hypothetical single-member subdistrict can be contracted or expanded at will. *See Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663, 686 (1962). As one lower court has held, "An effort to apply a population standard to the judiciary would, in the end, fall of its own weight." *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964).

CONCLUSION

This Court has always recognized the importance of an independent judiciary, holding in *Chandler v. Judicial Council*, 398 U.S. 74, 90 S.Ct. 1648, 26 L.Ed.2d 100 (1970): "There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function." 398 U.S. at 84, 90 S.Ct. 1648, 26 L.Ed.2d at 108. In a dissent in the same case, Justice Douglas stated, "An independent judiciary is one of this Nation's outstanding characteristics." 398 U.S. at 136, 90 S.Ct. 1648, 26 L.Ed.2d at 137 (Douglas, J., dissenting).

A quarter of a century ago this Court declared, "Legislators represent people, not trees or acres." *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 12 L.Ed.2d 506, 527 (1964). Unlike legislators, judges are not "instruments of government elected directly by and directly representative of the people." 377 U.S. at

562, 84 S.Ct. 1362, 12 L.Ed.2d at 527. Making judges representatives would do violence to (and perhaps destroy) the American concept of an independent judiciary.

For the reasons set forth herein, this Court should deny the Petition for Certiorari.

All of the above and foregoing is thus respectfully submitted.

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[SEAL]

U.S. Department of Justice
Civil Rights Di· ·ion

Office of the
Assistant Attorney General *Washington, D.C. 20530*

OCT 9 1990

Cynthia Y. Rougeou, Esq.
Assistant Attorney General
P.O. Box 94125
Baton Rouge, Louisiana 70804-9125

Dear Ms. Rougeou:

This refers to your request that the Attorney General reconsider the September 23, 1988, objection under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to the voting changes identified in Attachment A for the State of Louisiana. We received your request on August 10, 1990.

Under the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, an objection shall be withdrawn "if the Attorney General is satisfied that the change does not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group." 28 C.F.R. § 51.48(b). In its request for reconsideration the State of Louisiana has offered no new information or arguments to show that the electoral method by which its additional judges will be elected is not racially discriminatory. Rather, it appears that the State seeks a clarification of the reach of the Attorney General's objection.

In that regard, we iterate here what we sought to make clear in our September 23, 1988, objection letter, that our concerns under Section 5 went to the proposed method of electing judges and not to the number of judges *per se*. As we have suggested previously on a number of occasions, adoption by the State of a racially fair election scheme would provide an appropriate basis for withdrawing the objection. Until such time as the objection is withdrawn, however, the State may not lawfully implement any part of the process for electing those judicial positions which are the subject of outstanding Section 5 objections. See *NAACP v. Hampton County Election Commission*, 460 U.S. 166 (1985).

Under these circumstances, then, we see no basis for altering our earlier conclusions in this matter. Accordingly, on behalf of the Attorney General, I must decline to withdraw the September 23, 1988, objection.

Of course, in making this determination, we are cognizant of the recent decision of the Fifth Circuit Court of Appeals in *LULAC v. Mattox*, No. 90-8014 (5th Cir. September 28, 1990) (*en banc*) and we are studying the court's decision in that case to determine how, if at all, it may impact upon our enforcement responsibilities under the Voting Rights Act. However, we feel a responsibility to point out that we do not presently see that decision as immediately affecting the previously interposed objections to judicial elections in Louisiana.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

ATTACHMENT A

Judicial District Court Districts	Voting Changes
1st	Act 117 (1973), which creates an additional judgeship and a special election therefor
4th	Act 480 (1970), which creates an additional judgeship position
9th	Act 19 (1974), which creates an additional judgeship and a special election therefor
14th	Act 40 (1967), which creates an additional judgeship and a special election therefor
	Act 332 (1975), which creates an additional judgeship and a special election therefor
	Act 322 (1980), which creates an additional judgeship
15th	Act 360 (1970), which creates an additional judgeship and a special election therefor
	Act 43 (1976), which creates an additional judgeship
	Act 322 (1980), which creates an additional judgeship
18th	Act 86 (1968), which creates an additional judgeship and a special election therefor

[SEAL]

U.S. Department of Justice
Civil Rights Division

Office of the
Assistant Attorney General *Washington, D.C. 20530*

SEP 17 1990

Cynthia Y. Rougeou, Esq.
Assistant Attorney General
State of Louisiana
P.O. Box 94125
Baton Rouge, Louisiana 70804-9125

Dear Ms. Rougeou:

This refers to your request that the Attorney General reconsider and withdraw the September 23, 1988, and May 12, 1989, objections under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to the voting changes identified in Attachment A for the State of Louisiana. We received your requests on June 19 and 26 and August 10, 1990; supplemental information was received July 12 and 17, 1990.

This also refers to the voting changes identified in Attachment B for the State of Louisiana, submitted to the Attorney General pursuant to Section 5. We received your submission of Act 8 (1990) on June 19, 1990; supplemental information concerning those changes was received June 26 and July 12 and 17, 1990. We received the information to complete your submission of the remaining changes identified in Attachment B on July 17, 1990.

At the outset we begin with a recitation of some of the events which have preceded our review of all the voting changes which are before us today because those events play an important part in our consideration of these matters. You may recall that in 1987, we sent the State a number of letters requesting information concerning numerous voting changes within judicial election circuits and districts in Louisiana, including a request that the State respond to allegations that the method of electing trial and appellate court judges discriminated against minority voters. The State, however, failed to respond to our requests.

Meanwhile, in 1988, the court in *Clark v. Edwards* – a suit brought in 1986 by private plaintiffs challenging the method of electing judges in Louisiana – found that the method of electing trial and appellate court judges produced a "systemic" violation of Section 2 of the Voting Rights Act. By the time of the court's 1988 decision, the State still had not supplied us with the additional information we needed to analyze the voting changes in judicial circuits and districts then pending before us. Consequently, we used the record and findings from the *Clark* lawsuit to analyze the voting changes that were then pending before us for Section 5 review. On September 23, 1988, an objection was interposed under Section 5 of the Voting Rights Act.

In 1989, the State again submitted voting changes to us for Section 5 review and, there again, sought Section 5 preclearance of voting changes in judicial circuits and districts that had been found by the court in *Clark* to be racially discriminatory or had otherwise been the subject of the Section 5 objection interposed in 1988. Thus, on

May 12, 1989, a Section 5 objection was interposed to the implementation of those changes.

Later that year, in the summer of 1989, the State adopted a new election scheme, intended to remedy both the Section 2 violations found by the *Clark* court and the Section 5 objections interposed by the Attorney General in 1988 and 1989. However, because the proposed system created new senior judgeship positions in an apparent effort to accommodate and protect incumbent judges who might otherwise lose their seats if a racially fair election scheme were put in place, it required the approval of the voters in a state-wide referendum. As you know, that proposed scheme was disapproved by the voters in a November 1989 referendum.

Remedial proceedings in the *Clark* lawsuit were held earlier this year and those proceedings culminated in additional findings from the court. *Clark v. Roemer*, No. 86-435 (M.D. La., Orders of June 12 and July 6, 1990). On the basis of those findings alone, the State now seeks reconsideration of the previously interposed objections, as well as Section 5 preclearance of other voting changes which were either never before the court in the *Clark* litigation or were otherwise not before that court in the same circumstances as they are before us under Section 5. These include the 10th, 24th, 26th and 40th Judicial Districts, and the 2nd and 3rd Circuit Courts of Appeal. With regard to these judgeship positions and the proposed method of election therefor, we find the *Clark* decision to be inapposite because it pertains to factual circumstances in a judicial district different from the judicial district now before us for Section 5 review.

In that regard, we note that the differing factual circumstances are not insignificant. For example, one aspect of the *Clark* litigation involved a challenge to the method of electing judges in the 26th District. Because the State had not obtained Section 5 preclearance of the creation of a fifth judgeship in that District, the court in *Clark* examined the evidence in the context of four existing judgeships. Because the State has submitted to us a proposal to add a fifth judgeship to the 26th District, however, we are reviewing the method of electing judges in that district as it would exist if *five* judges were being elected. This distinction is critical because the *Clark* court found that a sample single-member district drawn in that District by private plaintiffs did not satisfy the requirement under *Thornburg v. Gingles*, 478 U.S. 30 (1986), that the minority group be shown to be sufficiently large and geographically compact to constitute a majority in a single-member district. As a result, though the at-large multimember structure in the 26th District now has been found by the court in *Clark* not to violate Section 2 because of that finding, the court properly made no determination with regard to the method of election if five judges were to be elected from that district.

Another example of how the facts and circumstances before us differ from those which were before the court in *Clark* is in the 2nd Circuit Court of Appeal. In the 2nd Circuit, the claims before the *Clark* court involved a challenge to a mixed election system for seven judges, in which one judge was elected at large circuitwide and six judges were elected from three double-member districts. We, however, are reviewing the creation of additional judgeship positions for the 2nd Circuit in the context of

proposed changes to the electoral structure: first, to an interim scheme of one circuitwide position, one double-member district and two triple-member districts; and, second, to an election scheme that subsequently will be comprised of three triple-member districts with at-large elections by designated posts, staggered terms, and majority vote. Similarly, as to the 3rd Circuit, the *Clark* Litigation involved a challenge to a scheme of three at-large circuitwide positions and three double-member districts, while we have been asked to assess the creation of additional judgeship positions in the context of an electoral structure that provides for three at-large circuitwide positions and three triple-member districts.

The fact, then, that the *Clark* court has vacated some of its findings as to a violation under Section 2 does not in and of itself afford a basis for withdrawing the objection under Section 5 to the voting changes involved. Indeed, during our reconsideration of the objected-to voting changes and our review of the additional voting changes that you have submitted, you have provided us with additional information concerning the voting changes and judicial districts at issue by incorporating information contained in certain Section 5 submissions that you made in 1989 and in response to our requests during the current review period. Much of the information does not appear to have been before the court in the *Clark* case. For example, in analyzing voting patterns to determine whether black voters are politically cohesive and whether whites vote sufficiently as a bloc usually to defeat the choice of black voters, the court in several instances did not have the benefit of any data concerning

parishwide election contests or data by parish for contests involving a number of parishes. We have analyzed such data, and our analysis indicates a significant degree of racially polarized voting in the districts at issue. Also, we have been able to analyze information that was not before the court concerning the racial identity of federally-registered voters, as well as demographic and voting information concerning modifications to alternative election schemes that demonstrate the geographical concentration of black persons in certain judicial districts.

Nor can we overlook the fact that in the face of findings of a systemic Section 2 violation by the *Clark* court in 1988, and notwithstanding the interposition of far-reaching Section 5 objections in 1988 and 1989, the State has failed to adopt a racially fair election system for its trial and appellate court judges even though the *Clark* court has given the State ample opportunity to do so. While, as noted above, the State did propose a new election scheme in 1989, it did so in a way which was intended also to protect incumbent judges. It is also particularly telling that there is nothing in Louisiana law we are aware of which would prevent the State from simply adopting a racially fair election scheme without incorporating referendum requiring provisions such as that connected with the earlier proposal aimed at current officeholders. Thus, the State's failure and refusal to adopt any remedial measures without also seeking to protect incumbents, the vast majority of whom are white, would appear to be elevating the State's concern for protecting white incumbents over the vindication of minority voting rights.

It is also significant that in several judicial districts, the State has available to it any number of alternative election schemes in which black voters clearly would have the opportunity to elect candidates of their choice. Yet, the State has not adopted any of these alternatives. For example, with regard to the proposed redistricting of the 10th District, we note that the State proposes to carve out one parish in order to create a new single-member judicial district, the 39th District, which has a 36.4 percent black population. The State thus chose to divide the 10th District in a manner that created one majority-white, single-member district, even though a single-member judicial district could be created which would have a substantial black-majority population. While we are cognizant that the proposed boundary lines apparently are based on parishes as the basic building blocks, these lines are not jurisdictional in nature but serve merely to outline the boundaries of the districts for election purposes. Accordingly, strict adherence to this criterion results in the dilution of a cohesive black population within the proposed new districts. Moreover, the State has deviated from this criterion in devising the districts of the 5th Circuit Court of Appeal which, inexplicably, the state has chosen not to do with regard to the proposed 10th and 39th Districts.

Similarly, with regard to the 2nd Circuit Court of Appeal, which has a 34.2 percent black population, there are alternatives for electing the proposed nine judges in which black voters would have a realistic opportunity to elect candidates of their choice. Also, with regard to the 3rd Circuit Court of Appeal, which has a 23.7 percent black population, available alternatives for the proposed

twelve judges would afford black voters the opportunity to elect candidates of their choice. As noted in our 1988 objection letter, such remedial alternatives would not necessarily require the State to draw single-member districts in every instance since, in a number of areas, the State could retain the multimember system utilizing limited or cumulative voting and abandoning the use of the racially discriminatory features such as numbered posts and majority vote which enhance dilution is those circuits.

In 1988, the *Clark* court admonished the State to "revise the [judicial election] system – to cast about for alternative procedures under which black voters would have a better chance to elect judicial candidates of their choice." *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988). So too, in 1988, we informed the State that it had a responsibility to consider appropriate remedial adjustments to afford black voters an opportunity to participate on an equal basis with white voters and to elect candidates of their choice. Notwithstanding these suggestions, the State has steadfastly adhered to the racially discriminatory multimember scheme and has resisted efforts in the *Clark* case to create single-member districts. Yet, as noted earlier, single-member districts are not the only available remedy. Indeed, our September 23, 1988 letter expressly observed that other corrective measure [sic] were available to the State, such "as the use of limited or cumulative voting schemes and the elimination of restrictive election features, such as anti-single shot voting devices and the majority vote requirement, that impede minority participation." The State has chosen not to avail itself of such remedial options.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has no discriminatory purpose or effect. See *Georgia v. United States*, 411 U.S. 526 (1973); see also 28 C.F.R. 51.52. In satisfying its burden, the submitting authority must demonstrate that the choices underlying the proposed change are not tainted, even in part, by an invidious racial purpose; it is insufficient simply to establish that there are some legitimate, nondiscriminatory reasons for the voting change. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977); *City of Rome, supra*, at 172; *Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982); *aff'd*, 459 U.S. 1166 (1983). While we do not in any way question the State's need for or purpose in creating new judgeship positions, we do find ourselves unable to conclude that the State has carried its burden of showing the absence of the proscribed purpose in its insistence on maintaining and expanding the existing dilutive system for electing candidates to those positions, a system that has been found by the court, or our analysis, to be violative of Section 2 of the Voting Rights Act. See, *e.g.*, 28 C.F.R. 51.55(b). Therefore, on behalf of the Attorney General, I must continue the objection to the implementation of the changes enumerated in Attachment A and object to the changes enumerated in Attachment B.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the changes do not have the purpose and will not have the effect or result of denying or abridging the right to vote on account of race or color.

In addition, Section 51.45 of the guidelines permits you to request that the Attorney General reconsider the objections. However, until the objections are withdrawn or a judgment from the District of Columbia Court is obtained, the effect of the objections by the Attorney General is to continue the legal unenforceability of the changes identified in Attachments A and B. See also 28 C.F.R. 51.10.

Because this matter remains pending before the court in *Clark*, we are sending a copy of this letter to the court and counsel of record in that case.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

cc: Honorable John V. Parker
Chief Judge, United States District Court

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ATTACHMENT A

Judicial District Court Districts	Objected-to Voting Changes
6th	Act 515 (1974), which creates an additional judgeship and a special election therefor
10th	Act 635 (1979), which redistricts the boundaries of the district
16th	Act 104 (1968), which creates an additional judgeship and a special election therefor
	Act 56 (1984), which creates an additional judgeship (Division G)
20th	Act 34 (1981), which creates an additional judgeship
21st	Act 9 (1974), which creates an additional judgeship and a special election therefor
	Act 56 (1984), which creates an additional judgeship (Division F)
23rd	Act 464 (1968), which creates an additional judgeship and a special election therefor
24th	Act 78 (1968), which creates an additional judgeship and a special election therefor
	Act 674 (1968), which creates an additional judgeship
	Act 503 (1974), which creates two additional judgeships and the special elections therefor

27th	Act 158 (1971), which creates an additional judgeship and a special election therefor
29th	Act 94 (1970), which creates an additional judgeship
	Act 56 (1984), which recodifies the additional judgeship under Act 94 (1970)

Circuit Courts of Appeal	Objected-to Voting Changes
First Circuit, Districts 2 and 3	Act 114 (1975), which creates an additional judgeship in each district and special election therefor and provides an implementation schedule
Section Circuit	Act 114 (1975), which creates an additional circuitwide judgeship
	Act 801 (1987), which creates an additional circuitwide judgeship and special election therefor
Third Circuit	Act 114 (1975), which creates an additional circuitwide judgeship
Third Circuit, Districts 1, 2, and 3	Act 801 (1987), which creates an additional judgeship in each district and special elections therefor
	Act 200 (1987), which changes the special election dates under act 801 (1987)

ATTACHMENT B

Judicial Districts	Voting Changes
24th	Act 8 (1990), which creates an additional (sixteenth) judgeship
26th	Act 174 (1989), which creates an additional judgeship
40th	Sections 3(A) and 3(B) of Act 611 (1989) and Act 608 (1989), which create an additional judgeship position (Division C)
2nd Circuit, Court of Appeal	Act 8 (1990), which creates a ninth judgeship position to be elected by designated Division C in 2nd Circuit District 3; provides for a change in method of election for 2nd Circuit judges from two elected at-large circuitwide and two elected from each district by designated divisions to three elected from each district by designated divisions, except as specified for the incumbent in the at-large position to be converted to the Division C position of Second Circuit District 2; provides that the judgeship position created by Act 801 (1987) will be elected as the designated Division C position from 2nd Circuit District 1; and provides an implementation schedule therefor

[SEAL]

U.S. Department of Justice
Civil Rights Division

Office of the
Assistant Attorney General *Washington, D.C. 20530*

SEP 17 1990

Cynthia Y. Rougeou, Esq.
Assistant Attorney General
P.O. Box 94125
Baton Rouge, Louisiana 70804-9125

Dear Ms. Rougeou:

This refers to your request that the Attorney General reconsider and withdraw the September 23, 1988, and May 12, 1989, objections under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to the following voting changes for the State of Louisiana:

> Orleans Parish Criminal District Court: Act 236 (1972), which creates an additional judgeship and a magistrate, and act 143 (1975), which creates five additional judges and decreases terms from twelve years to six years;
>
> Orleans Parish Civil District Court: Act 235 (1970), which creates an additional judgeship position (Division J), and Act 129 (1975), which creates five additional judgeships and decreases terms from twelve years to six years.

We received your requests on June 19 and 26 and August 3, 1990; supplemental information was received July 12 and 17, 1990.

This also refers to Act No. 8, S.B. No. 345 (1990), to the extent that it creates the thirteenth and fourteenth at-large judgeships (Divisions M and N) for the Orleans

Parish Civil District Court; and provides an implementation schedule therefor for the State of Louisiana, submitted to the Attorney General pursuant to Section 5. We receive your submission on June 19, 1990; supplemental information was received July 13 and 17, 1990.

At the outset, we note that when the state originally submitted Acts 129 and 143 (1975), the submissions characterized the voting changes as an increase from five to ten judgeship positions for both the civil and criminal district courts in Orleans Parish. Although we asked for clarification of the voting changes effected by these statutes, we have not received your response. Our further analysis, however, indicates the following:

(1) Act 129 recodifies ten judgeship positions, eight of which antedate the state's coverage under Section 5 and one of which received the requisite Section 5 preclearance in 1986. Accordingly, the effect of the September 23, 1988, objection applied only to the tenth judgeship position (Division J) for the Orleans Parish Criminal District Court, a position that was initially created under Act 235 (1970) and recodified by Act 129 (1975).

(2) Act 143 (1975) recodifies ten judgeship positions, seven of which antedate the state's coverage under Section 5. Accordingly, the effect of the September 23, 1988, objection to Act 143 (1975) applied only to three judgeship positions for the Orleans Parish Criminal District Court.

We have carefully reviewed the information you have provided, as well as comments and information from other sources and interested parties. Our analysis indicates that the changes do not have the purpose and will

not have the effect of discriminating on the basis of race or color and that implementation of the changes will not lead to a clear violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973. Accordingly, the objections interposed September 23, 1988, and May 12, 1989, to the specified changes for the Orleans Parish Civil and Criminal District Courts are hereby withdrawn. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.48 and 51.55).

With regard to the changes under act 8 (1990) for the Orleans Parish Civil District Court, the Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. See 28 C.F.R. 51.41.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

No. 90-898

JAN 15 1991

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JANICE G. CLARK, *et al.*,
Petitioners,

v.

CHARLES "BUDDY" ROEMER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In opposition to the petition for certiorari, the respondents state:

> When, as here, . . . a law simply adds a much-needed judicial seat to a multi-member district, in the absence of discriminatory intent such a statute is not covered by *either* Section 2 (because the "results test" is inapplicable to the judiciary) or by Section 5 (because Section 5 cannot be used as a guise to preclude a state from adding a judicial seat when such a seat cannot be enjoined under Section 2).

Brief in Opposition at 23 (emphasis added). This highlights the need for the granting of a writ of certiorari.

Because of the interrelationship of Section 2 and Section 5, the decision below has led not only to questions about Section 2's applicability but also the applicability of Section 5. Thus, in addition to contending that Section 2 is irrelevant, the State of Louisiana also asserts that Section 5 is unavailing, even though this Court has held to the contrary in *Brooks v. State Board of Elections*, No. CV 288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court), *aff'd mem.*, 112 L.Ed.2d 243 (1990), and *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986). *See also, Clark v. Roemer*, 59 U.S.L.W. 3360-3361, No. A-327 (Nov. 2, 1990, as modified Nov. 5, 1990) (injunction pending appeal against elections for unprecleared judgeships). This conflict requires the grant of certiorari to resolve the Section 2 issue, and also illustrates the need to note probable jurisdiction in *Clark v. Roemer*, No. 90-952 (jurisdictional statement filed December 14, 1990), which is the appeal in this same litigation from the three-judge district court's resolution of the Section 5 claims regarding Louisiana judgeships.

Most of the arguments in the respondents' brief opposing the petition for certiorari were presented to this Court in 1988 when Louisiana state officials unsuccessfully sought their own writ of certiorari from the Fifth Circuit's previous decision in *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.), *cert. denied*, 109 S.Ct. 390 (1988), holding Section 2 applicable to judicial elections. This Court did not find the arguments sufficiently compelling at that time to grant certiorari and review the Fifth Circuit's decision in *Chisom* that Section 2 covers judicial elections. Accordingly, the same arguments do not provide a suffiicent basis to prevent the Court from granting certiorari now that the Fifth Circuit has reversed itself and said Section 2 does not apply.

Indeed, it would appear quite confusing for this Court to have denied certiorari in *Chisom* when the Fifth Cir-

cuit said judicial elections are covered, and some two years later to follow the respondents' current suggestion and deny certiorari even though the Fifth Circuit has now said the exact opposite. This is an important issue and the petition for writ of certiorari should be granted to resolve it.

Respectfully submitted,

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